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CASES AT LAW,

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

SOUTH CAROLINA,

FROM NOVEMBER, 1839, TO MAY, 1840, BOTH INCLUSIVE.

BY

LANGDON CHEVES, JR.,

STATE REPORTER.

SECOND EDITION.

TO WHICH HAVE BEEN ADDED NOTES REFERRING TO CASES IN THE SOUTH CAROLINA REPORTS AND TO THE STATUTES AT LARGE.

KFS
1860
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CHARLESTON, S. C.
McCARTER & DAWSON, 116 MEETING STREET.
1860.

Rec. Sept. 14, 1875

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CASES AT LAW,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA.

Columbia—Fall Term, 1839.

JUDGES PRESENT.

HON. RICHARD GANTT,
" JOHN S. RICHARDSON,
" JOHN BELTON O'NEALL,
HON. BAYLIS JOHN EARLE,
" JOSIAH J. EVANS,
" ANDREW PICKENS BUTLER.

NATHANIEL SIMS *vs.* DAVIS & TAGGART.

The mere use of a way over uninclosed land, will never ripen into a presumption of right; but a prescription might have grown upon implied assertions of the right on the one part or admissions on the other.

The contrary opinion in *Roland* v. *Wolfe*, (1 Bailey R. 56,) and in *Garrett* v. *McKee*, (1 Bailey R. 341,) reviewed.

Before EVANS, J., at Union, Spring Term, 1839.

This was an action on the case for obstructing the plaintiff's private way from his house to a public road. The way was through the uninclosed ground of Davis, who caused his overseer, Taggart, to inclose the land and make a way around it. The other points of fact on which the decision of the Court rested are fully set out in the subjoined opinion from the

Bench, The jury found for the plaintiff; upon which the defendant appealed:

Because the Court ought to have ordered a nonsuit, on the motion of the defendant's counsel; the evidence being insufficient in law to sustain the action.

Curia, *per* EVANS, J. The plaintiff claimed a right of way over the defendant's land, along an old road which had existed for many years. The road was called the Vincent road, but when, or by whom, it was laid out, or how it originated, did not appear. It was proved that the plaintiff, in common with his neighbors, had travelled along this road for a period exceeding twenty years, and that the plaintiff also used it as a mill road, but not always for that purpose, as he frequently sent to mill in other directions. There was no proof that the plaintiff had opened the road, or that he had worked on it, or exercised any dominion or control over it, except as above stated; or that Davis, or those from whom he derived his title, had ever acquiesced in or done any act which could be construed into an admission of the plaintiff's right of way over the land, except that no objection ever was made previous to the obstruction for which this action was brought.

Under these circumstances we are to decide whether the plaintiff has acquired a right of way over the defendant's land. If he has, then the verdict is right; if he has not, then it is wrong, and must be set aside. I need not here repeat what is so familiar to every lawyer; that, after a possession of land for twenty years, a deed or grant will be presumed; and also that where a man has enjoyed and used a way over another's land for the same period, it will be presumed that he had originally a right to do so, the evidence of which has been lost by lapse of time. In matters of antiquity, the law substitutes the possession, in the case of land, and the use, in the case of a way, for the deed or grant; the nature and extent of which, in both cases, will depend on the nature of the possession and

use. To confer a title in either case, all the authorities, both English and American, concur that the possession and the use must be adverse to him who was the owner. This term, *adverse*, as applied to ways, according to our decisions in analogous cases, means such use as men make of their own property; and must be accompanied by such facts and circumstances as show that it is claimed as a right exercised without the consent, and in opposition to the rights, of the owner of the soil.

It will be perceived from this, that I am not disposed to adopt the opinion intimated in *Roland* v. *Wolfe*, (1 Bailey, 56,) and in *McKee* v. *Garrett* (1 Bailey, 341,) that in no case can a prescriptive right of way be acquired over the uninclosed land of another. Those cases were, doubtless, decided right upon their own facts, but the dictum above stated, in the broad terms in which it is laid down, was never satisfactory to the profession, and may be considered as modified by the subsequent case of *Smith* v. *Kinnard*, (2 Hill, 642, *n.*) Since this case was argued, we have carefully considered and examined it; and we all concur in the opinion that a right of way may exist by prescription over the uninclosed woodlands of another, subject to the qualifications and limitations hereinafter stated. As a general rule, I would say that the use of every such way is permissive, or held at sufferance, where the claimant has done no act showing that he claimed the right adversely, and the allowance of the use by the owner of the soil has been unaccompanied by any act which shows a recognition, on his part, of the right of the claimant to use the road without his permission. Most of the old roads which, like this, lead from one public road to another, or from neighborhood to neighborhood, sprung up from accident. In the early settlement of the country, paths through the woods were made by repeated travelling along the same track. In process of time, by continued use, these tracks were enlarged into cart and wagon ways. They were convenient to the proprie-

tor's neighbors and did not interfere with his dominion over the land. In the beginning, therefore, they may be said to have originated in the tacit permission of the owner. The use continued in the same way, no one ever supposing that a use thus commencing could ever ripen into a right. An adverse use must be something for which the owner may sue: it must be something hostile to his entire dominion over his property. In England lands are, generally, if not altogether, inclosed, and to enter on a man's land is, literally, to break his close; but, in this country, the fact is otherwise. Most of the land is uninclosed, and I can scarcely conceive it possible that the riding over such lands, and, especially, along a road which has originated in the implied assent of the owner, can be even a technical trespass, until the implied permission has been revoked. We feel the difficulty of laying down general rules to govern all cases, and it is not intended to do it on this occasion; but we think we may venture to say, that no right of way can arise from merely riding or walking over a man's uninclosed woodland, unless there be some assertion of ownership by the claimant, or some act of the owner of the soil showing an admission that the claimant had a right. Thus: if the claimant laid out the road and used it for twenty years; or if he worked on, enlarged, or kept it in repair; or if the owner of the soil cleared the land and left a lane for the claimant's use; these, with acts of the like kind, would seem to amount to an assertion of a right on the one part, and an admission of it on the other. The plaintiff's case presents no evidence of an adverse use, or of any admission of his right by the defendant; and it is the unanimous opinion of this court that the verdict should be set aside, and the motion for a nonsuit granted; and it is ordered accordingly.

Herndon, for the motion.

See 1 M'M. 44, 329. 1 Sp. 20. 2 M'C. 451. 2 Strob. 60. 5 Strob. 217. 11 Rich. 262. 8 Rich. 163. 7 Rich. 390, 447. 6 Rich. 399, 116. 1 Rich. 58. *An.*

J. M. DEVALL *v.* JOY TAYLOR.

Proceedings before an inferior Court are void, unless they carry upon their face the evidence of jurisdiction; and, therefore,

The oath upon which a Magistrate issues an attachment, though it need not be *taken* in writing, must be recited in the writ.

An affidavit in the disjunctive (of one *or* the other) of two facts, would be bad to sustain an attachment, though either, positively deposed, might be sufficient.

An affidavit that defendant "is *about* to remove out of the State personally," will not sustain a domestic attachment.

Before EARLE, J., at Abbeville, Fall Term, 1839.

The affidavit to a writ of domestic attachment, stated that the defendant "was about to remove out of the State personally, or so absconded and concealed himself, that process could not be served upon him." The writ was quashed, for insufficiency in the affidavit to give jurisdiction to the Magistrate. This order, the plaintiff moved the Court of Appeals to set aside.

Curia per EARLE, J. The attachment acts authorize Justices of the Peace to grant writs of attachment in certain cases, on the oath of the plaintiff, returnable either to the next Court for the district, or before themselves, according to the amount sued for. The cases provided for, in which Justices have this extraordinary jurisdiction, are, 1. Where the debtor is removing out of the district privately; 2. Where he absconds and conceals himself, so that the ordinary process of law cannot be served upon him; and 3. Where he intends to remove his effects. Although it has been held, in *M'Kenzie* v. *Buchan*, (1 N. & M'C. R. 205,) that the oath of the plaintiff, establishing the particular state of facts which gives jurisdiction to the Justice, need not be in writing; yet it is clear, both on general principle and on authority, that it should be recited in the writ. This is universally true of all Courts of

inferior and limited jurisdiction—that their proceedings must show, upon their face, that the subject-matter is within their jurisdiction, else they will be regarded as nullities. And very many cases will be found in the English books, and in our own, of their being quashed on motion. The general rule, as stated by the Court in *Winford* v. *Powell*, (2 Ld. Raym. 1310,) in regard to inferior Courts, is, that nothing shall be intended to be within the jurisdiction, that is not expressly averred so to be; though, in the case of a superior jurisdiction, nothing shall be intended out of it; (the same in 5 Mod. 322; 6 Mod. 223.) Str. 8; 6 Term, 583; Whenever a special authority is given to Justices, it ought to appear that the authority has been exactly pursued. Lord C. J. Pratt said, in a case before him, "I do not see to what purpose we exercise a superintendency over all inferior jurisdictions, unless it be to inspect their proceedings and see whether they are regular or not. I have often heard it said, that *nothing* shall be presumed one way or the other in an inferior jurisdiction."

If the proceeding show upon its face that the Justice had no authority to grant the attachment, or if it fail to show that he had, then no judgment could be given upon it, either by himself, or by the Circuit Court; but the whole is an absolute nullity, and it is of no consequence in what way the defect is brought to the view of the Court, or at whose motion it is quashed. *Hagood* v. *Hunter*, (1 M'C. R., 511,) is exactly this case; and, perhaps, it would have been enough to refer to it. There the affidavit was, that the defendant was "about to remove from and without the limits, *or* so absconds and conceals himself," &c. Here he is "about to remove out of the State personally, *or* so absconds and conceals himself," &c. To authorize the attachment, there should be a precise allegation of some one of the three categories which give jurisdiction. To be "about to remove out of the State personally," is very different from being in the act of "removing privately out of the district;" and there is as much reason to suppose the writ

issued on that part of the oath, as on the other. Indeed, I would consider an affidavit, or recital of one, in the disjunctive, as bad, although either of the facts deposed to might be sufficient.

This case is very unlike those of *Havis* v. *Trapp*, and *Grisham* v. *Deale*, (2 N. & M'C. R. 130.)—There, the motion was to allow defendant to introduce affidavits of himself and others to contradict the oath of the plaintiff, and to quash the attachment because it was not true. This was refused, because it made up a collateral issue, where the Act had provided that the plaintiff's oath alone should be sufficient; and the Court properly refused to go into evidence *aliunde*, when the attachment was regular and valid on its face.

Motion dismissed; the whole Court concurring.

Wardlaw and *Perrin*, for the motion. *Burt* and *Thompson*, contra.

See 5 Rich. 478; 4 Rich. 561; 4 Strob. 290; 2 McM. 335; 1 McM. 461, 264. *An.*

A. R. LAWRENCE *v.* JOEL GAULTNEY.

The judgment of a Justice's Court of another State is entitled to "full faith and credit" here, as a judicial proceeding, and is a good ground of action.

But, as its authentication is not provided for by the Acts of Congress, it must be proven on Common Law principles.

How such a judgment may be most conveniently proven.

Before EVANS, J., at Lancaster, Spring Term, 1839.

Sum. pro. to recover the amount of two judgments rendered against the defendant by justices of the peace in North Carolina. The evidence produced consisted of the original judgments and executions, with a certificate of the Clerk of the County Court, that the persons whose names were signed to the judgments were magistrates, and that their signatures were genuine; and the certificate of the presiding magistrate of the

county court, that the person certifying was clerk. The Court held that an action might be brought on such a judgment, but that the evidence adduced was not sufficient to establish it, and therefore ordered a nonsuit.

Plaintiff appealed, on the ground that the opinion of the Court on the inadequacy of the evidence was erroneous.

Curia, per EVANS, J. Since the case of *Clark & Smith* v. *Parsons*, (Rice's R. 16,) there can be no doubt an action may be brought on such a document as the plaintiff has endeavored to establish. It is a judicial proceeding, and we are bound, under the constitution, to give it full faith and credit. But, if neither Congress, nor the State Legislature, has prescribed any mode for proving such judgments, (and the Acts of Congress, of 1790 and 1804, do not apply to this case,) then we must find in the Common Law the rules by which they are to be established. The fundamental rules of evidence are, that the best shall always be produced, and that every fact shall be proved by the oaths of witnesses, unless the law has prescribed some other mode. The plaintiff had to show, 1, that a justice had jurisdiction of his case by the law of North Carolina; 2, that the person who decided it *was* a justice; and 3, that he did, in fact, render the judgment alledged. The last of these requisites would have been sufficiently established by the paper adduced as the original proceeding before the magistrate, if the signature of the latter had been proven, as in *Clark & Smith* v. *Parsons*. Still, the proof must have been deficient, as in that case, for want of the *best* evidence on the other two points; for the certificates of the clerk and presiding magistrate of the county were not under oath; nor are they, by any enactment, made authentic in proceedings of this character. The law of North Carolina, by which the justice had jurisdiction of this case, might have been proved under the provisions of the act of Congress of 1790, or, according to our precedents, by the production of the printed laws of that state. In

the same manner, it might be shown that the person who signed the judgment was a justice, if his appointment had been made by the legislature. If the appointment was by the governor, or by any other authority; then an exemplification of the office books, certified according to the act of Congress of 1804 (2 Story's P. L. 947), would have proved it.

Motion dismissed; the whole Court concurring.

See 9 Rich. 175; 5 Strob. 33; 2 Sp. 282; 1 Bail. 242; Harp. 418; 3 Brev. 543, or 2 Tread. 743; 2 Bay, 555, 487. *An.*

OBADIAH LAW AND WIFE *vs.* ELIJAH FRANKS.

In an action for malicious prosecution, a declaration, alleging that the plaintiff was arrested, entered into recognizance, and was "afterwards therefrom discharged, and that the prosecution was wholly ended and determined," is not sustained by proof of acquittal before a petit jury.

The word "*discharged*," is not equivalent in pleading to "*acquitted*," which term alone expresses a discharge upon trial *per pais*.

The Court will not hear a motion to amend a declaration after the case has gone to the jury, and is arrested by a nonsuit.

Before O'NEALL, J., at Laurens, Spring Term, 1839.

This was an action for malicious prosecution. Mrs. Lowe had been arrested, at the instance of defendant, on a charge of trading with a slave, and had entered into recognizance. On the indictment presented the grand jury found a true bill, upon which the prisoner was acquitted before the petit jury. At the close of the plaintiff's case, (which seemed a strong one,) defendant moved for a nonsuit, because the *allegata* and *probata* did not correspond.

The declaration set out the information, the arrest and the entering into recognizance, and then averred that the plaintiff was "afterwards therefrom [from her recognizance] freely and fully discharged, and that the prosecution was wholly ended

and determined." There was no allegation of a true bill found and acquitted before the petit jury. Upon this discrepancy the Court was reluctantly constrained to order a nonsuit; which the plaintiffs moved to set aside,—

On the ground that the declaration was good and sufficient in law, and was fully supported by the proof. And, in the event of failing on this ground, they asked leave to amend the declaration.

Curia, per O'NEALL, J. The general rule in pleading is, that there should be "a clear and distinct statement of the facts which constitute the cause of action or ground of defence, so that they may be understood by the party who is to answer them, by the jury, who are to ascertain the truth of the allegations, and by the Court, who are to give judgment." (1 Chit. Pl. 236.*) The declaration in this case will not stand the test of the rule, being silent in regard to a material part in the history of the facts.

In *Morgan* vs. *Hughes*, (2 T. R. 225,) Mr. Justice Buller makes the following remark on this subject (p. 231): "Saying that the plaintiff was *discharged* is not sufficient; it is not equal to the word '*acquitted*,' which has a definite meaning. When the word '*acquitted*' is used, it must be understood in the legal sense; namely, by a jury on a trial." The word "*discharged*," then, does not import, with requisite legal precision, a verdict upon trial *per pais*.[1] Again, (2 Chit. Pl. 302, *n.*†) it is said that "the proceedings in the original prosecution are to be described as in the record of acquittal;" and it will not be pretended that, in the declaration before us, this rule has been observed. A proper description of acquittal before a petit jury is found in *Thomas* vs. *DeGraffenreid*, (2 N. & M'C, R. 144,) "Legitimo modo acquietatus." This is precise, and points with accuracy to the mode of discharge which will be given in evidence under it. The motion to set aside the non-

* New ed. 268. † New ed. p. 612 note *l*.

suit is dismissed. The motion to amend cannot be allowed: it is too late to ask for that after the case has been before the jury.[2] *Glenn* vs. *M'Cullough*, (2 M'C. R. 212.)

RICHARDSON, EVANS, and BUTLER, JJ., concurred, EARLE, *dubitante;* GANTT, J., absent at the argument.

Sullivan, for the motion; *Young*, contra.

[1] See 3 McC. 463.
[2] See 7 Rich. 150; 3 Hill, 197; 2 Rich. 145; *Post.* 67. *An.*

BENJAMIN RICHARDSON *vs.* WILLIAM MURRAY.

Where an obvious arithmetical error, in a discount specially pleaded, was corrected by the jury, so that the discount allowed was greater than that claimed by the plea, the Court would not set aside the verdict.

Before RICHARDSON, J., at Spartanburgh, Fall Term, 1839.

The defendant pleaded in discount to a note of nine hundred and seventy dollars, the part value of a negro slave whom he had delivered to the plaintiff as security or satisfaction for a debt of five hundred dollars, "which negro," said the plea, "the plaintiff was to account for at his true value, or what he could be sold at; and the defendant avers that the said plaintiff was afterwards offered and could have obtained for the said negro man the sum of fifteen hundred dollars; and therefore declares and avers that the plaintiff is bound to account to him under the aforesaid agreement for the sum of nine hundred dollars."

The jury found for the defendant; upon which the plaintiff appealed,—

Because the verdict contradicts the plea, which admits seventy dollars to be due to the plaintiff.

Curia, per RICHARDSON, J., held that a verdict, otherwise satisfactory, should not be set aside upon so obvious a mistake

in terms only. If a new trial were allowed, the court would also have to give the defendant leave to correct the arithmetical error in his plea, and lay his demand at one thousand dollars instead of nine hundred dollars; which would place the parties exactly where they now stood under the verdict.

Motion dismissed; the whole Court concurring.

Choice, for the motion; *Henry* and *Bobo*, contra.

See 3 Hill, 281; 3 McC. 468. *An.*

WILSON NESBIT *v.* JAMES M'DANIEL, (late Sheriff of Greenville District).

A writ in trover cannot be served under the provisions of the Act of 1827, in any other district than that to which it is returnable.

It is the intention of that Act, that the taking of the bond, &c., therein prescribed, shall be *after* action brought by service in the usual way.

Before RICHARDSON, J., at Greenville, Fall Term, 1839.

This was a special action on the case against the late sheriff of Greenville district, for failing to arrest Russel Price, and to take bond, under the act of 1827, upon a writ in trover for a negro, at the suit of the plaintiff.

The writ was returnable to Spartanburg Court House, and had, besides the usual order for bail, the following indorsement: "Spartanburg district," &c. "To all and singular the sheriffs," &c. "You and each of you are hereby required, without delay, to cause the defendant to enter into bond with sufficient security to the sheriff of said district, for the production of a negro boy, Job, in his possession, to satisfy the plaintiff's judgment in case he should recover against the defendant. Oct. 6, 1836.—T. TAPP, Clerk." This writ was lodged with the sheriff of Greenville district, and, upon his failure, as above stated, to make the arrest, this action was brought.

The Court charged that this process was a good and sufficient authority for the sheriff of Greenville to arrest Price in his district, and the jury gave a verdict for the plaintiff of four hundred and ten dollars.

Defendant moved for a new trial, on the ground of error in the judge's charge.

Curia, per RICHARDSON, J. It was contended in argument on the circuit that, in virtue of our act of 1827, under which the indorsement was made upon the writ before us, the sheriff of any district might arrest a defendant in trover, notwithstanding he had not been served with the writ in the district to which it was returnable; and I so charged the jury, rather than keep them from the consideration of the merits of such a case, upon a question of construction yet new and undecided. But I am satisfied, on more mature deliberation, that the act will not admit of this interpretation.

The Act of 1827 (p. 81*) provides, upon a proper affidavit made by the plaintiff in trover, that an order shall issue "to all the sheriffs of the state, requiring them," &c., "to cause the defendant to enter into bond with sufficient security to the sheriff of the district *in which such action shall be brought*, for the production of the chattel sued for, to satisfy the plaintiff's judgment," &c. This is a remedial statute, and is to be liberally construed for its obvious purpose of securing the plaintiff in his chattel. But though, for this end, it may be proper that after action brought, the sheriff of any district where the defendant happens to be shall take a bond payable to the sheriff of the district in which the action shall have been brought; certainly it is *not* requisite that the action of trover shall have the peculiar privilege of being commenced in one district, by service of a writ in any distant part of the state. This would be an anomaly in our juridical system, not to be introduced upon mere construction, or anything short of the imperative letter

* 6 Stat. So. Ca. 337.

of the act. To use a language somewhat technical, each judicial district would then, as to the action of trover, be a Westminster Hall, and all the rest be as *nisi prius* districts. A citizen of Pickens Court House might be arrested and carried to make his defence in Charleston. Thus, while the first principle of our circuit system, (the original and exclusive authority of each court within its limits,) was violated, its wholesome policy also would be utterly frustrated, which intends that the tribunal of justice shall be as convenient as possible, alike to plaintiff and defendant.

From this position, it follows that the service in Greenville, of the writ returnable to Spartanburg, would have been void, and of course no action will lie against the sheriff for having failed to make it. A nonsuit is therefore ordered.

The whole Court concurred.

Perry, for the motion.

See 3 Rich. 178; 2 Hill, 520. *An.*

SION MURPHY *v.* JOSEPH AND LOTTY PRICE.

A sheriff's deed under an execution, which should have conveyed the land of an intestate, but by mistake was made to convey that of his administrator, was not permitted to pass the land of the intestate.

Where there was a variance between a judgment and execution, and the sheriff's title under them; if the error were in the judicial records, then the Court might allow them to be amended; but otherwise, where the mistake was in the sheriff's deed, which is matter *in pais*.

Before O'NEALL, J., at Union, Fall Term, 1839.

Trespass to try title to land formerly belonging to John Prince, the defendant's father, who died intestate. The plaintiff proved an execution and sale of the land at the suit of *Sion Murphy* v. *Isaac Pearson*, administrator of the deceased, and, showing how they came into his possession, rested his claim

upon the sheriff's titles. The sheriff's deed recited the execution, "*Sion Murphy* v. *Isaac Pearson, Administrator of John Prince, deceased*," and stated a seizure and sale, *as of the land of the defendant in the execution.* The defendant moved for a nonsuit, which was ordered, "because the sheriff's deed did not convey the land of *John Prince, deceased*, but the land of *Isaac Pearson.*" "The plaintiff moved," says the presiding judge, "to amend the deed so as to conform to the execution and judgment; but I thought I had no right to amend a conveyance. The execution, or judgment, being records of the court, I could amend;[1] but over a matter *en pais* I thought I had no authority."

The plaintiff appealed for error in ordering the nonsuit and refusing permission to amend; but—

Curia, per O'NEALL, J., confirmed the decision of the Court below; GANTT, RICHARDSON, EVANS, and BUTLER, JJ., concurring. EARLE, absent.

Thompson and *Dawkins*, for the motion; *Herndon*, contra.

[1] 2 Bail. 494; Harp. 478. *An.*

SAMUEL STINSON *v.* WM. BRENNAN, Administrator of Crowder.

A surety on a note, who has let judgment go by default, and has paid the debt, has recourse upon his principal for indemnification, notwithstanding that the latter, who was sued at the same court, by defending the case, obtained a decree in his favor. But, *semble*, not if he had been notified of the defence.

Before BUTLER, J., at Chester, Fall Term, 1839.

Sum. pro. for money paid by the plaintiff, who was surety on a note of William Crowder, intestate. He was sued, let judgment go by default, and paid the debt and interest. The administrator of Crowder was sued at the same court, de-

fended the case and got a decree in his favor. The defendant contended that he was not liable to indemnify the plaintiff, who might evidently have prevented the recovery against him; but the presiding judge "thought that it was the defendant's own business, and if he did not defend the case, and the plaintiff was compelled to pay the money, then the defendant's intestate would be liable to him." *Peters* v. *Burnhill*, (1 Hill, 234.)

A decree was given for the plaintiff, and defendant appealed,—

Because the Court erred in holding that the defendant was liable to the plaintiff for the debt paid as surety, when it had previously decreed that the principal was not bound to pay the debt; especially as the defendant, having no notice of the suit, could not have been reasonably expected to defend it.

Curia, per BUTLER, J. A principal on a note occupies a double position, involving two liabilities. He is responsible to the party with whom he makes the contract, and, also, to his surety, who may have paid the money for him. If the surety had paid the money voluntarily when due,—as constantly occurs in commercial cities—it is conceded that he would then have his action. When the same payment is enforced by law, he cannot surely hold a worse position, nor the principal a better. To the suggestion that the surety might have resisted and defeated the recovery, he may reply that he was a stranger to the consideration of the note, and was privy to nothing more than the terms of an absolute obligation, which he bound himself to make good if not punctually fulfilled. But if he had been made privy to his principal's defence, then he might have lost his right to redress.

Defendant's motion dismissed; the whole Court concurring.

Thompson and *Eaves*, for the motion.

See 10 Rich. 427. *An.*

JAMES B. DAVIS *vs.* D. F. RUFF.

In an action of slander, words affecting the pecuniary credit of a merchant need not be averred nor proven to have been used in relation to his occupation as a merchant; for, in their nature, they strike at the root of mercantile character.

Plaintiff in slander, who participates in the risks of a mercantile concern, but does not share in the profits, shall not recover for injury to his character as a merchant, without showing special damage.

It is no slander of a *firm* to say that one of the partners is broke. The right of action on such words accrues to the individual.

A verdict in slander, although much larger than the discretion of the Court would have awarded, will not be disturbed on that account alone.

Before O'NEALL, J., at Fairfield, Fall Term, 1839.

This was an action for slanderous words. They are charged in the first count, to have been uttered of the plaintiff, "as a merchant." The second count alleges that the plaintiff was a merchant, and charges that the words were spoken of and concerning him, without adding "as a merchant." The declaration also averred special damage.

The words proved were "he was broke, or he considered him broke, and he could not pay more than fifty cents in the dollar, probably not more than ten cents in the dollar."

"Dr. Davis's note would not do, he was broke, and the defendant had known this for some time."

"Dr. Davis was regarded as, or reported to be insolvent, and had been for some time."

The defendant on being offered a note on some person, declined buying it; the person offering it commended it, saying the maker was good; and the defendant replied saying, "So every one would, twelve months ago, have thought Dr. Davis good: he had a note on him for which he would willingly take less than the amount."

On sale day, in May, 1838, the defendant repeatedly said, "A report had come to the village of Winnsborough that Davis had made an assignment, mortgage, or confession of judgment to his father to the amount of seventy-two thousand dollars.

To one of the witnesses, Woodward, he said he had made inquiries, and, from Daniel Kirkland, he found that it was confirmed. He said Kirkland or some other person had mentioned it to Dr. Davis, and he did not deny it.

The plaintiff was a planter, resident in Fairfield district, and connected at the time with the mercantile firm of W. B. Thompson & Co. :—whether strictly a partner or not, was disputed; and the presiding judge remarks,—

"The question on this part of the case was carefully submitted to the jury. They were told, unless the plaintiff was a merchant, he could not maintain his action without proof of special damage, which was, I thought, very slight. They were told, if the plaintiff had no share in the profits of the mercantile copartnership of which he was a member, that then, notwithstanding his liability for the debts, he was *not* a merchant to be affected by the publication of the slander."

The charge of an assignment or confession by plaintiff to his father, the judge considered to have been only the repetition of a report already prevalent, and says, "The only matter connected with it which could make him (defendant) responsible, is his communication to Dr. Woodward, in which he said that 'he had made inquiries, and from Daniel Kirkland found it was confirmed.' He said, Kirkland, or some other person 'had mentioned it to Dr. Davis, and he did not deny it.' The latter part of this communication, about the report being communicated to Dr. Davis and his not denying it, was contradicted by Kirkland, the person referred to." "As to the other charges," the Court observed, "there was no proof that they had been in circulation before the defendant spoke of them. In a conversation with Dr. Jennings, some time before the speaking of the words, the plaintiff told him he had been much embarrassed by being indorser, perhaps to the amount of seventy-two thousand dollars, but he had freed himself from most of it, at least one half. This witness spoke of this conversation. General Means said, in March, 1838, he had heard

it said by a neighbor, as a rumor from Chester, that the plaintiff was in debt to the amount of sixty thousand dollars. A. B. Williams said that in 1835 or 1836, Mr. Marshall, of Columbia, was uneasy on account of indorsing for the plaintiff. Col. John Glenn, (an uncle of the plaintiff by marriage,) said he had heard from the plaintiff's relatives that he was much involved. Dr. Furman said the people regarded the plaintiff as lavish and extravagant."

The jury found for the plaintiff, thirty-five hundred dollars.

The defendant moved for a nonsuit,—

Because the *colloquium* in the first count, averring that the words were spoken of the plaintiff in his capacity of a merchant, was not sustained by the proof; and because the second count did not contain this averment, which was essential.

And for a new trial.

1. Because the plaintiff was not a merchant at the time the words were spoken; or, if he was, the words did not relate to his occupation as a merchant, and therefore are not actionable.

2. Because, if he was a merchant, and the words did relate to such his occupation, the action should have been in the name of himself and partners; the more, as special damages were laid in the declaration and evidence was offered in relation to them.

3. Because the damages were excessive and out of all proportion to the nature of the offence; especially as injurious reports were in circulation before the alleged words were spoken, and had originated in the declarations of the plaintiff himself.

Curia, per O'NEALL, J. The general rule is, as stated in 1 Saund. 242 *a.* note 3, that where the words are only actionable because they are spoken of a tradesman, the plaintiff must

aver and prove that the words were spoken in relation to his trade. But to this rule, there is one plain and well recognized exception; that where the words are such as affect a man's credit, then it is neither necessary to aver, nor to prove that they were spoken in reference to the particular trade or business which the party was pursuing. The reason assigned by Starkie, (St. on Sl. 134,) is that of common sense: "A general charge, of a want of credit, necessarily includes the particular one, and is equally pernicious with a more precise allegation." Nor is there any artificial rule which prevents us from adopting this reasonable view. Indeed, all the authorities acknowledge and sustain it, with the exception of the dicta in *Ser'jt Williams'* notes to 1 Saund. 242, *a.* 3, and 2 *id.* 307. In these, it is manifest that the learned, and, in general, very accurate editor, did not advert to the distinction which Mr. Starkie has pointed out, and which seems to be well supported by very ancient decisions. In *Read* v. *Hudson*, (Ld. Raym. R. 610,) the plaintiff declared in one count that he was a laceman, and that the defendant, speaking of his trade said, &c., in another count he says that the defendant, *ex ulteriori malitia sua, de statu* of the plaintiff *colloquium habens*, said these words, "You are a rascal; you are a pitiful sorry rascal; you are next door to breaking." The question arose on this last count. The Court, in the absence of Holt, C. J., gave judgment for the plaintiff, declaring that he was a tradesman, and that, where the words were spoken *de statu suo*, it is equivalent to *arte sua* and to be intended of his trade. The words in that case imported a want of credit, they affected his condition, and hence applied to him in his trade as well as any other capacity in which he stood. So in *Stanton* v. *Smith*, (Ld. Raym. R. 1480,) it was held to be actionable to say of a tradesman "he is a sorry, pitiful fellow and a rogue, he compounded his debts at five shillings in the pound," though there is no colloquium of his trade. That would seem to be in point to this case upon the second count, in which, as in that, there

is no colloquium about his trade. In *Cawdrey* v. *Highly*, (Cro. Car. 270,) these words,—"Thou art a drunken fool and an ass, thou wert never a scholar, and art not worthy to speak to a scholar, and that I will prove and justify," spoken to a physician, were held to be actionable, without any colloquium concerning his profession. The fact that the words were in that case *addressed to* the physician, cannot of itself dispense with the colloquium. The same words spoken *of* him would have had the same effect. They imputed a want of knowledge, which, like a want of credit, attached to the person, and went with him in every business, and affected him therein. After these authorities, it cannot be necessary to pursue further the defendant's grounds for nonsuit: they cannot avail him.[1]

As to the grounds for new trial, the Court held that, on the first, which was a question of fact, the jury had been properly charged, and their decision was final: and that, as to the second, it was no slander of a firm to say that one of the partners was broke. Such words went, not to the particular business, but to the general mercantile character of the individual. In regard to the damages, the Court adhered to the opinion of the judge below, that, although they were much larger than, according to his view of the case, he would have found, yet if there was deliberate malice, then the verdict was none too high; and that was a question for the jury, which should not be disturbed on a mere difference of opinion.

Motion dismissed; RICHARDSON, EVANS, and EARLE, JJ., concurring. GANTT and BUTLER, JJ., dissented.

Clark and *M'Call*, for the motion; *Gregg* and *Player*, contra.

[1] See 1 McM. 19; 1 N. & McC. 290. *An.*

* Com. Dig. action on the case for Defamation, D; Tom. Law. Dict. Action, ii., 1.

EXECUTORS OF W. THOMAS *v.* EXECUTORS OF J. R. ERVIN.

Assumpsit against an Attorney for negligent delay whereby a debt was lost, though brought as soon as the loss could be definitely ascertained, was barred by the statute of limitations; the actual neglect and the circumstances of the debtor which rendered the loss probable, having existed four years previous.

And the damage subsequently accruing did not constitute a fresh cause of action.

Before EVANS, J., at Darlington, Fall Term, 1839.

Ervin, an attorney, received from Thoms, in the year 1819, for collection, the bond of one Wiggins; and accordingly, on the inquiry docket of Marion district, S. T. 1820, appears the case of *W. Thomas* v. *B. Wiggins*, in debt, with a note of "*judgment final:*" but no judgment was ever entered up, or execution issued. Very soon after, Thomas died. In 1829 Ervin again brought suit in the name of Thomas, entered up judgment, issued execution, and made every effort to procure the payment of the debt. But Wiggins had assigned his property the year before, for the payment of his debts in a certain order, and, (the assignees having filed a bill against the creditors in 1831, on which a decree was had in 1836, and the estate proving inadequate to the liquidation of its debts,) the greater portion of this claim was lost, in consequence of its being only a bond debt at the date of the assignment. It did not appear that the executors of Thomas were aware, prior to the decree, that no judgment had been entered up previous to the date of the assignment.

The jury found for the defendants, under the instruction of the Court that the plaintiffs were barred by the statute of limitations. And from this opinion of the Court, the plaintiff, moving for a new trial, appealed.

Curia, per EVANS, J. There are four periods in the history of this case, at one of which the statute must have commenced

to run; 1. When Ervin neglected to enter up judgment in 1821; 2. When Wiggins assigned his property in 1828; 3. When Ervin sued Wiggins in 1829, in the name of Thomas, who had been eight years dead; 4. When it was fully ascertained, by the decree of the Court of Equity in 1836, that the debt was lost.

The three first of these periods are more than four years from the commencement of this action in 1838, so the question is reduced to the inquiry, whether the statute commenced to run before the effect of Ervin's negligence was fully ascertained by the final decree of the Court of Equity in 1836.

In the consideration of the case we must carefully distinguish between the act from which the plaintiffs' loss arose, and the effect which resulted from that act. The plaintiffs' complaint is that Ervin, as their attorney, so negligently managed their case, that they have lost their debt. It is the *negligence*, then, of which they complain. The loss of the debt is a consequence of the negligence, and these stand towards each other in the relation of cause and effect. If Ervin had entered up judgment and issued execution, the subsequent assignment of Wiggins, the suit of 1829, and the final decree, would have been wholly immaterial to the plaintiffs. They would have had a lien on Wiggins' estate, which nothing afterwards occurring could defeat. I think, therefore, we may safely conclude that the plaintiffs' cause of action was the negligence of the attorney, and that what occurred afterwards was but the consequence of that neglect.

If this case be considered in reference to authorities, the same conclusion will follow. I am not aware that the question has been settled in our own courts, but it has often been decided in England, and in the other States of our confederacy. Thus in *Miller* v. *Adams*, (16 Mass. R. 456,) which was an action against a sheriff for negligently making an insufficient return. The return was in 1808, and judgment the same year: in 1814 the judgment was reversed by writ of

error on account of the insufficiency of the return. The question was, at what time did the action accrue of the plaintiff. The Court say, "we are all of opinion the action accrued on the return of the writ into the clerk's office." So, also, in *Short* v. *M'Carthy*, (3 Barn. & Ald. 626,) the attorney, who had been employed for the purpose, neglected to examine whether certain stock which the plaintiff was about to purchase, stood in the seller's name on the books of the Bank of England. The attorney reported that it did, and, upon the faith of this, the plaintiff purchased. More than six years afterwards, it was ascertained that the report made by the attorney was untrue, and the plaintiff consequently lost the benefit of his purchase. The Court held that the statute began to run from the time of the attorney's neglect. The same principle was decided in New York in the case of *Troup* v. *Ex'rs of Smith*, (20 Johns. R. 33.) But the case which most nearly resembles this in every particular, is that of *Wilcox* v. *Executors of Plummer*, (4 Peters' R. 172.) A note of one Banks, endorsed by Hawkins, was placed in the hands of Plummer, an attorney, on January 28, 1820. Judgment was recovered against Banks on August 20, 1820, but he proved insolvent. In February 1821, the attorney sued Hawkins in the name of wrong plaintiffs, and was nonsuited in 1824. In the meantime the note, as to Hawkins, was barred by the statute of limitations, the action which had been brought being a mere nullity. Thereupon the plaintiffs sued Plummer in the Circuit Court of the United States for the district of North Carolina. The case turned upon the question whether the statute of limitations began to run from the time of the attorney's neglect to sue Hawkins, within a reasonable period after receiving the note, or at the time when the effect of this negligence was manifested by the nonsuit of the plaintiffs. The Supreme Court decided that the statute commenced at the time of the negligence. Between that case and this, there is a remarkable similitude in every particular.

In both, the relation of client and attorney continued to exist until the debts were finally ascertained to be lost, and the negligence of Plummer was as continuous as that of Ervin.

By our statute of limitations, an action must be brought within four years after the cause of it has accrued; so that the question always is, when could the plaintiff have had his action? The answer is, whenever the contract has been violated, if it be on a contract, or, if it be for a tort, then when the act was done from which the injury to the plaintiff arose. It may be, that the full extent of the injury is not developed, but that cannot vary the case. Can it be doubted that the plaintiffs could have sued Ervin after he had neglected to enter up judgment, so as to create a lien on Wiggin's property, or that the jury might have given damages for the injury they had sustained? In the case of *Russel* v. *Palmer*, (2 Wilson, 328,) one Steward had been sued and held to bail. He was afterwards surrendered by his bail; but the attorney neglected to charge him in execution; in consequence of which neglect, Steward was discharged. Lord Camden directed the jury to find against the attorney for the whole debt, three thousand pounds. A new trial was granted, because, the action being for damages, the jury should have been left to find what damage they thought fit. On the next trial they gave five hundred pounds, Steward not appearing to be insolvent, or unable to pay the debt.

From all the cases, I think it manifest that the plaintiffs' action accrued from Ervin's neglect to enter up judgment and issue execution against Wiggins. If the damage was the cause of action, then it would follow that a new action might be brought for every new development of damage; and the plaintiffs might have sued Ervin for the negligence in 1821, and again when the debt was jeoparded by Wiggin's assignment; and, if in these two actions they did not recover the whole debt, they might sue again for the balance after the final decree. But the reverse of this has been decided in

Fetter v *Beale*, (1 Salk., 11.) Upon the whole, we are all of opinion that the plaintiffs' action was barred by the statute of limitations; so the motion for a new trial is refused.

Law for the motion.

See 1 Sp. 398; 4 Rich. 40; 2 McM. 183. *An.*

J. JOHNSON *v.* L. WIDEMAN.[1]

A witness attending upon a subpœna ticket alone, without writ, is entitled to his fees from the party cast in the suit.

Where the successful party has paid witnesses subpœnaed on *both sides*, who has already been paid, without his knowledge, by his defeated adversary, he shall, nevertheless, have their fees taxed against the latter.

And the party cast may recover at law, from the witnesses, not what he paid, but what they fraudulently received from the other party, to his damage.

Before EARLE, J., at Abbeville, Fall Term, 1839.

Appeal from taxation of costs. Witnesses who had attended for both parties, (having been already paid by the defendant, who was defeated in the suit,) were afterwards taxed for the plaintiff. The clerk also allowed, for other witnesses who had attended for the plaintiff, upon subpœna tickets only, without any writ, the sum of two shillings four pence *per diem*. Defendant's motion to strike out both these charges was refused. It appeared that the witnesses subpœnaed by both parties, had been paid by the plaintiff as well as by the defendant.

Defendant, on appeal, renewed his motion below.

Curia, per EARLE, J., held that "witnesses summoned by ticket only, might not be held liable to process of contempt, or otherwise, for refusing to attend; yet, if they chose to waive the informality, no one else could complain, and they were entitled to be paid, at least, their two shillings four pence per diem, according to *Bratton* v. *Clendennen*".[2]

As to the witnesses subpœnaed by both parties, it was held that if the defendant had paid them before the taxation, and the plaintiff *had not*, then their costs should not have been allowed again; but if the plaintiff had paid them, *not knowing* that the defendant had done so likewise, then he was entitled to have whatever he had thus expended, taxed against the defendant. "In such case," the Court observed, "the defendant could recover at law, from the witnesses, not the sum which he himself had paid them, but that which they had improperly and fraudulently received a second time, and which was ultimately collected from him."

The whole Court concurred.

Wardlaw and *Perrin* for the motion; *Burt*, contra.

[1] S. C. twice before—Dud. 325; Rice 325. *An.*
[2] Harp. 454.

NATHAN B. ARRANTS *v.* ROBERT W. DUNLAP.

A commissioner of special bail has no discretion to discharge, under the prison bounds Act, one who is *accused* of fraud, &c: He is imperatively required to refer that accusation to a jury.

The distinction formerly existing in regard to the judicial authority of the Commissioner of special bail in cases of arrest on *mesne* and on *final* process, (2 Hill, 433,) is done away by the Act of 1833.

Before G. Q. MCINTOSH, Commissioner of Special Bail for Kershaw District.

The defendant, arrested and imprisoned on bail process, at the suit of one Arrants, moved, before the Commissioner of Special Bail, to be discharged, on making an assignment to the plaintiff of his schedule, which had been duly filed. The plaintiff, accusing him, upon disclosures elicited by a cross-examination of the defendant, of dishonest omissions in his schedule, and of a fraudulent assignment to his brother,

opposed the motion. The Commissioner referred the case, at this stage, to a jury organized under the provisions of the Act of 1833, (p. 44; 6 Stat. So. Ca. 491;) and, the schedule being found false[1] and fraudulent, the defendant was returned to jail.

Of several exceptions taken by the defendant on appeal, and which were overruled, the only one involving matter of general interest was, that the Commissioner ought, himself, to have decided the question of fraud, according to the terms of the Act of 1788. (P. L. 456; 5 Stat. So. Ca. 78.)

Curia, per BUTLER, J. We are of opinion that the Commissioner proceeded correctly. According to the construction given, in *McClure* v. *Vernon*, (2 Hill, 433,) to the fourth and seventh clauses of the Act of 1788, there existed a distinction between the powers of the Commissioner of Special Bail in *mesne* and in *final* process. In cases of arrest under *mesne* process, he could, under the fourth clause, try the question of fraud in the schedule, so far as to judge whether the prisoner's oath should be believed or not, and whether, therefore, he should be discharged: while, under the seventh clause, relating to prisoners in execution, his power to discharge was only in the absence of any accusation of fraud, &c.; and it would seem that the accusation alone was enough to require the intervention of a jury.

But this distinction could no longer obtain after the Act of 1833, which does not recognize it, and, in all probability, was intended to obviate the difficulties arising out of it, and to do it away. The preamble sets out that, as there was no mode prescribed for empannelling a jury under the Act of 1788, some provision ought to be made for that purpose. It is then declared, "that whenever a prisoner, confined on mesne or final process, applying for the benefit of the Act aforesaid, shall be *accused* by the plaintiff, or his agent, of fraud, or of his having given an undue preference to one creditor to the pre-

judice of the plaintiff, or of having made a false return, or having gone without the prison walls or prison rules, as the case may be, it shall be lawful for the Judge, or Justice, or Commissioner of Special Bail, who shall hear the prisoner's application," to organize a jury, according to the directions of the Act, to try the question. The plain meaning of this clause is, that no prisoner shall be discharged by a Commissioner of Special Bail, after he shall have been *accused* of fraud; but that it is the imperative duty of that officer, after such accusation, to call to his assistance a jury. If the jury should sustain the plaintiff's accusation, the prisoner must be remanded; otherwise he must be discharged.

Proceedings of the Commissioner confirmed; the whole Court concurring.

Smart for the motion; *Withers*, contra.

[1] See note post 242. *An.*

See infra, 246. 9 Rich. 49. 10 Rich. 13.

ISAIAH DUBOSE *v.* ADMINISTRATOR OF S. L. DUBOSE.

The order for judgment, indorsed by the clerk upon the record, is an "interlocutory judgment," as contemplated by the Act of 1746, "for preventing the discontinuance of process and abatement of suits;" and, after such order had, an action within the provisions of that law will not abate by the death of a party.

Before EVANS, J., at Darlington, Fall Term, 1839.

This was an assumpsit; in which, for default of appearance, the usual order for judgment was indorsed upon the record. Very shortly after, the defendant died. Plaintiff then sued out a *sci. fa.* (under the Act of 1746, P. L. 212; 7 Stat. So. Ca. 191,) against his administrator, who also made default, and the case was put upon the inquiry

docket. As no interlocutory judgment had been entered up, the Court was of opinion that this case was not saved by the Act, and, therefore, should abate by the defendant's death.

Whereupon the plaintiff appealed.

Curia, per EVANS, J. At common law, the death of either party before final judgment, abated the action. To remedy the inconvenience of this, our Act of 1746, provides "That, in all actions to be commenced in any Court of record in this Province after the passing of this Act, if any plaintiff shall happen to die after an interlocutory, and before a final judgment obtained therein, the said action shall not abate by reason thereof, if such action might be originally prosecuted by the executors and administrators of such plaintiff. And if the defendant die after such interlocutory judgment, and before final judgment obtained therein, the said action shall not abate, if such action might be originally prosecuted against the executors or administrators of such defendant."

The next clause of the Act provides for the issuing of a *sci. fa.* to show cause why damages should not be assessed; and, if no cause be shown, then a writ of inquiry of damages shall be awarded, which being executed, final judgment shall be rendered for the plaintiff.

On the hearing of this case, I thought it not within the provisions of the Act, because no judgment had been entered up; upon further consideration, I am persuaded that my first impression was wrong, and in this opinion all my brethren concur. We conceive the *interlocutory judgment*, spoken of in this Act, to mean nothing more than the *order* for judgment, by default either of appearance or plea, which the clerk, according to our practice, makes on the back of the declaration. No judgment is ever entered up on this; but the case goes upon the inquiry docket, whither it would have no right to go unless the order were, in fact, the judgment. The case of *Kincaid* v. *Blake*, in attachment, (1 Bailey, 20,)

was decided on this principle; and the death of the defendant after the expiration of the rule to plead did not abate the suit. We are therefore of opinion that the appellant's case did not abate by the death of the defendant, and that the plaintiff had a right to sue out a *sci. fa.* and to have his damages assessed, unless some good cause were shown to the contrary, according to the practice of the Court.

The whole Court concurred.

See Act of 1791, 7 Stat. 263, § 6; 2 N. & McC. 549; 3 Strob. 131. *An.*

THE STATE *v.* WILLIAM THOMPSON.

After a prisoner has pleaded not guilty, he may not avail himself of misnomer in the indictment, either on his trial, or in arrest of judgment, or on motion for a new trial.

Before O'NEALL, J., at Lancaster, Fall Term, 1839.

The prisoner was convicted of petit larceny. In the *body* of the indictment he was called by the name of William Foster, instead of William Thompson. The *indorsement* was in his true name. He pleaded to the indictment, and the case had gone to the jury, and had been argued in part, before it was objected that William Foster, and not the prisoner, was the person charged. The presiding judge thought that the objection, if good in any shape after a plea of not guilty, could only be taken advantage of in arrest of judgment.

Defendant moved in arrest of judgment and for a new trial, on the following grounds:

1. Because the indictment charges the offence to have been committed by William Foster; not by the prisoner.

2. Because his Honor charged the jury that a defect in the indictment could not avail the prisoner on his trial before them.

Curia, per O'NEALL, J. refused both motions; adhering to the rule (in 1 Chitty Cr. L. 202,) that "the name and addition of the party indicted ought regularly to be truly inserted in every indictment: but, whatever mistake may be made in these respects, if the defendant appears and pleads not guilty, he cannot afterwards take advantage of the error." It was observed that there was no hardship in the rule; for the prisoner lost no advantage or privilege by it on his trial, and, if he had need afterwards to resort to a plea of *autre-foits convict*, he would be allowed to show that he was the same person heretofore convicted by the name of William Foster.

The Court concurred unanimously.

Wright and *Clinton*, for the motion; *Player*, contra.

LEWIS BROWN *v.* SERGEANT GRIFFIN.

A "true bill" found, constitutes a presumption of probable cause for the prosecution, and a plaintiff in an action for malicious prosecution, who had proved his general good character and defendant's malice, was yet nonsuited for want of express evidence to rebut this presumption.

Before RICHARDSON, J. at Pickens, Fall Term, 1839.

This was an action for a malicious prosecution. The plaintiff rested his case upon the defendant's information on oath,—on which had ensued a warrant, an arrest, an indictment for perjury, and a "true bill" found by the grand jury;—upon evidence of his own general good character; upon the fact that the alleged ground of prosecution was an occurrence of twenty-seven years standing, which the defendant had been acquainted with all along; and upon the defendant's admission (as witness on the trial) that a late quarrel with the plaintiff was, in part, his motive for proceeding against him.

The Court ordered a nonsuit, because the plaintiff had made no showing of a want of *probable cause* for the prosecution.

The plaintiff moved to set aside the nonsuit.

Curia, per RICHARDSON, J., held that "where the grand jury have returned a true bill upon the charge made, such finding amounts to a judicial recognition that probable cause does exist. Hence arises a rule, that a plaintiff, suing for damages in such a case, must *prove the absence* of probable cause; and, if he fail to do so, such judicial recognition is *prima facie* proof of a probable cause."

And it was considered that, although the plaintiff's character might have given him a strong defence on his trial, and the staleness of the charge, coupled with the quarrel that ultimately gave rise to it, were pregnant evidence of the defendant's malice, (which is one of the essential grounds for this action,) yet they did not in the least tend to show that the prosecution had not been instituted, according to C. J. Marshall's definition, on "such circumstances as warrant suspicion." (*Locke* vs. *U. States*, 7 Cranch, 339.)

Motion dismissed; EVANS, EARLE and BUTLER, JJ., concurring.

See 3 Strob. 576. *An.*

THOMAS HUGHES, Jun., *v.* THOMAS HUGHES, Sen.

Defendant's admission that "he was willing to settle, and to pay anything that might be due on a fair settlement; but he thought he had paid plaintiff enough," did not prevent the bar of the statute of limitations.[1]

The purchase of one's land at Sheriff's sale, with an agreement that he shall remain in possession and refund the money at an indefinite period, does not create a *continuing trust* to bar the statute of limitations.

Before O'NEALL, J., at Union, Fall Term, 1839.

Assumpsit, commenced in 1838. Plea,—the general issue and the statute of limitations.

At the instance of defendant, the plaintiff, in 1826, purchased, at sheriff's sale, the defendant's land; but did not take titles. He agreed to satisfy, to the amount of his bid, (one thousand five hundred dollars,) the judgment debts of the defendant, who was to remain in possession of the land, and to refund him the money. Between that time and 1828, the plaintiff laid out, in pursuance of this agreement, one thousand three hundred and seventy-three dollars and six cents; and, in the same interval, defendant refunded four hundred and seventy-four dollars and ninety-three cents. In 1829, defendant, at first, refused to give plaintiff one hundred dollars, but afterwards let him have it. On February 4, 1833, defendant's son paid plaintiff one hundred dollars, at which defendant was much displeased when he heard of it, saying that he owed plaintiff nothing. In March, 1838, (before this action was brought,) being served with a rule to show cause why the sheriff's title should not be made, defendant stated that the plaintiff had bid off the land to him as a friend; that he was willing to settle and to pay anything that might be due on a fair settlement; but he thought that he had paid the plaintiff enough. He repeated the same expressions, shortly after, to the plaintiff's attorney. The jury, being instructed by the Court that the plaintiff was barred by the statute, found for the defendant, and the plaintiff moved for a new trial,—

Because the defendant's promises took the case out of the statute, and—

Because this was such a case between trustee and cestuique trust, as the statute could not run against in *equity;* and the same principle should operate here.

Curia, per O'NEALL, J. The rule laid down in *Young* v. *Monpoey*, (2 Bailey, 278,) has been uniformly followed, that, after the lapse of time within which a debt would have been barred by the statue, to prevent the bar "there must be

either an express promise to pay, or an admission of a subsisting debt, which the party is willing and liable to pay." It is recognized and enforced in *Reigne* v. *Desportes*, (Dud. Rep., 118,) which declared the old debt to be the consideration, and the new promise the cause of action. Therefore, if the new promise could not entitle the plaintiff to recover, it is clear that the bar of the statute applies. In the case before us, the plaintiff's cause of action began, at the latest, from his last payment in 1829, for the defendant's benefit, and in 1833, the time of the statute had run out. The money previously paid by the plaintiff, and up to that time constituting his cause of action, then ceased to be such, and after that, his right of action depended on the defendant's admission. In March, 1838, he said "the plaintiff had bid off the land for him as a friend; he was willing to settle and pay any thing which was due, on a fair settlement; but he thought he had paid the plaintiff enough." To Mr. Thompson, just before the commencement of this suit, he said "he thought he had paid the plaintiff enough; he, however, was willing to settle, and if there was any balance, he would pay it." These two acknowledgments are in substance this—"I think I have paid the plaintiff; I will however settle, and if there is any thing due, I will pay it." Upon this, as the cause of action, can there be a doubt that the plaintiff could not recover? Certainly not, unless he could show a settlement and a balance against the defendant.

In *Allcock* v. *Evans*, (2 Hill, 326,) defendant's saying his partner ought to have paid the note, and "Allcock ought to be paid," was held neither to be an express promise to pay, nor an admission of a subsisting debt, which he was willing and liable to pay; and his proposition that he would "pay no interest, but would pay the principal by giving his note, payable in three, six and nine months, with interest from the date," not having been confirmed by acceptance, was considered not to be a promise to bar the statute. In *Bonnetheau*

ads. *Johnson*,[2] (Riley's L. C. 1,) defendant's plea of the statute was, it is true, defeated by these words: "I have also an account against Dr. Johnson, which I will discount against his when I get mine made out, and will settle with you." These expressions do somewhat resemble those of the present case; but Johnson, J., observed there, that "the proposition of the defendant to discount his own account against the demand, is in itself a distinct concession of his liability to pay it; and the declaration that he would *settle* with the plaintiff's agent, when his account was made out, is in common parlance substituted for a direct promise to pay, and, as used here, would scarcely admit of any other construction." In the case before the Court, the same word "*settle*" was used, but certainly not in a sense synonymous with "*pay*."

On the second ground of appeal, the Court said "this is not a case of technical continuing trust, against which the statute of limitations will not run. If it was, the plaintiff would have no business here. Equity, not law, would be his remedy. If there is a trust in the matter, (and I do not think there is,) it would be a constructive trust, against which the statute runs both at law and in equity. But this is a mere legal demand. The plaintiff has paid money for the defendant at his request."

Motion dismissed; EVANS, EARLE and BUTLER, JJ., concurring.

Thompson, for the motion; *Herndon*, contra.

[1] See 1 McM. 201.
[2] 3 Hill, 15.

J. P. FARR ET AL, heirs at law of W. B. Farr, *v.* W. P. THOMPSON, Executor of W. B. Farr.

The rule, that one shall not discredit his own witness, is for the protection of the witness himself, and shall not be dispensed with by consent of the parties litigant.

And the rule excludes, not only general evidence against the character, but former inconsistent declarations; and every matter that would be inadmissible or irrelevant, except for the purpose of impeaching the credit.

But a party may introduce contradictory evidence upon facts material to the issue, and thus incidentally impeach the credit of his own witness; and this will not let in evidence of good character in reply.

Where, however, a party was, irregularly, allowed to introduce the inconsistent declarations of his own witness, evidence of character ought to have been admitted in reply.

A will legally executed shall not be set aside on the mere ground that its provisions are in favor of a mulatto woman, with whom the testator (a hard drinker and paralytic) had lived in disgraceful intimacy; who had had great domestic influence over him, and of whom he had sometimes appeared to be in personal fear.

There must be proof, not only of influence, but, that it had been expressly and unlawfully brought to bear upon the will.

A disposition of property, though ever so capricious and unreasonable, will not be avoided on that ground alone.

"What facts, if proved, shall constitute undue or improper influence, to avoid a will, I hold to be a question of law; and I think in cases of this kind, the particular sort of influence should be set down in the pleadings." (*Earle, J.*)

Before EVANS, J., at Union, Spring Term, 1839.

This case arose upon a contested will. The wide ground occupied by the opinion of the Court, leads to the necessity of considerable detail in the history of the case, which is given in the words of the Circuit Judge's report.

"The testator, W. B. Farr, was a man about sixty-six years of age at the time of his death, which took place in 1837. He made his will in August, 1836, and a codicil in February, 1837. By the will he gave all his estate, real and personal, which was estimated to be worth fifty or sixty thousand dollars, to the appellee, W. P. Thompson, and appointed him sole executor. The codicil was a revocation of a paper executed

some years before, whereby he gave to his nephew, Farr Duff, certain property after his death. The validity of the will had been contested before the Ordinary on several grounds, but he had decided in favor of the executor. The heirs at law appealed, and the case was brought up to this Court to be tried, on the following assignments of error in the decision of the Ordinary:

1. That the will was not executed according to law.

2. That it was obtained by undue influence exercised over the testator by the executor, Dr. Thompson, and by a negro woman named Fan, and her son Henry.

3. That it was obtained by threats made by the same persons.

"To the understanding of the evidence which will be hereafter detailed, it is necessary I should state that the testator was never married. He had lived for many years in a state of illicit intercourse with a mulatto woman, his own slave, who assumed the position of a wife, and controlled, at least, all the domestic arrangements of his family. The issue of this intercourse was a boy, named Henry, who was acknowledged by the testator as his son. Many years before his death, he had endeavored, by application to the Legislature, to effect the emancipation of this boy. These efforts proving unavailing, the testator, after, or about the time he arrived at manhood, sent Henry to Indiana, where he had him settled, and provided him, from time to time, with considerable sums of money. His mother, Fan, was a bright mulatto, and Henry was nearly white. Dr. Thompson, the executor, had been the family physician of the testator, and was called in frequently to prescribe for Fan, who was frequently unwell. The appellants are the half-brothers of the testator, and his nephews and nieces, of the whole blood, who are entitled to his estates if he died intestate.

"The will was executed in the presence of three witnesses, who saw him sign it, and attested it in his presence. The

testator came to the house of Mr. Dawkins, one of the attesting witnesses—the other witnesses were sent for. The testator produced the will from his pocket, and folded it so that the witnesses could not see the writing. Dawkins objecting to sign it without knowing what was in it, the testator replied it would never do them any injury, and he did not wish to make a blowing horn of everything he did. The witnesses then attested it, but none of them could say whether there was any writing above the signature, as the testator carefully folded down the paper so as to conceal the writing, if there was any. The will was an exact copy, or nearly so, of one written for the testator by Judge O'Neall, in 1828. The only difference that I recollect, was, that the legatee and executor was changed, by substituting Dr. Thompson in the place of Judge O'Neall, as legatee and executor.

"The only point made on the first ground, was on the question whether the will was not blank when executed, and filled up afterwards. I thought the evidence afforded no ground to impeach it for this cause.

"On the opening of the case, the appellants called Mr. Dawkins, one of the witnesses. Among other questions asked him, was, if at the time he attested it, it was signed by the testator, and whether he had not said it was neither signed nor acknowledged by the testator at the time he attested it. The witness admitted he had said so after the testator's death, and explained that at the time of execution he was in bad health, and that he was unable for some time to call to recollection the facts, but afterwards he remembered all the circumstances, as he had stated them in Court and before the Ordinary. He was also questioned as to some other circumstances, about which he had made statements to other persons, some he denied, and some he admitted and explained. The appellants were allowed to examine witnesses to prove that he had formerly said the will was not signed or acknowledged before him; and also that he had stated to them some

facts which he denied on his examination in Court. This evidence was offered for the declared purpose, not of showing the witness was not entitled to credit, but to show his memory was not to be relied on. The rule, as stated in *Perry* v. *Massey*, (1 Bailey R. 32,) is that the party shall not be allowed to impeach his own witness, by showing his character is infamous, but may offer evidence to show that the witness is mistaken, by proving that at other times he had made a different statement of the facts. The evidence was admitted on this ground, and no other use was made of it in the argument. It appeared that formerly, in 1828, the testator had made a will whereby he gave his whole estate to Judge O'Neall, and appointed him sole executor. This was accompanied by written instructions to Judge O'Neall, declaring certain trusts in relation to the property, which the executor was to execute for the benefit of Fan and Henry. At the time of the trial before the Ordinary, the executor presented a paper signed by himself, in which he set out certain secret trusts, which he was, by agreement with the testator, to execute. This paper was offered in evidence and rejected, because it was the declaration of the executor, and could not be received in evidence for him. In the course of the trial, the appellee proposed to go into evidence of the general good character, both of the witness, Dawkins, and the executor, Dr. Thompson. In both cases the evidence was rejected. The character of Dawkins was not assailed, and the character of Dr. Thompson was not put in issue by either the evidence or the pleadings."

Touching the charges of undue influence, the evidence was that Farr was a man originally of strong mind, and, as one witness said, "as hard headed as any man," but that he was much enfeebled by hard drinking, and "his memory was impaired by a stroke of the palsy, but he was capable of doing business." He talked often about the disposition of his property; said, sometimes, he would give it to his half-

brothers; sometimes designated other relations; sometimes said none of them should have a cent; that Fan should have it all; that he would leave it to Henry.

Fan had the influence over him of a white woman and a wife. He put his mare to a horse after having refused to do so, because she desired it; had a clock which he cursed, and said he would not have bought it but for Fan; promised to destroy a dog that killed sheep, but did not do it because she objected; bargained for a negro, but would not buy till her pleasure was consulted; sold a negro girl at her desire, and made titles to another one that she offered for sale as her own, and when he had made the titles, said "he hoped she would now be satisfied, as there was no other woman left; he hoped he would have some peace." The witness thought she had such influence that she could have had any negro sold that she pleased.

At Christmas, 1835, Farr said he should not live long, and wanted to divide his property out among his relations, equally; Fan said, "what is to become of me and Henry?" Farr said he would give her money enough to maintain her during life, and she might go to a free State; she replied, "before any of the Farrs should have any of the property she would lose her life." Fan refused to let a servant come to him when he called; they quarrelled about it—she shook her fist in his face and threatened to knock his teeth down his throat; witness heard them quarrel in the night; heard her call Hannah, a servant, to bring her the whip, and she'd beat his skin off.

They would get drunk together, and she was insolent to him; told him to hush, or she'd give him hell; cursed him for a damned rascal, rubbed her fist in his face and dared him to open his mouth; called him a damned old palsied rascal.

Farr once sent for Dawkins, and said Fan had tried to kill him with a spear; she threw it at him and it stuck in the bed post; Fan was drunk, and he made them make friends.—Another witness said, "Farr sent for him to come and see

him; when he came Fan was cursing tremendously; her sleeves were rolled up; she said, God damn—I'll see your heart's blood, for I caught you in bed with another man's wife. Witness would have beaten her, but Farr requested him not—said she was a damn fool any how, and he was a little afraid of her when she got into her tantrums; they were drinking. This was in 1832 or 1833." At another time he said he did not know why he took up with Fan; when he was well and could go about, he did not mind her, but since he had been palsied, he had better be in hell.

The jury found against the will, reversing the judgment of the Ordinary, and the appellees moved for a new trial—

On the ground of error upon several points touching the admission and rejection of evidence, (as will appear more fully by reference to the opinion of the Court.)

Because the will was proved to have been legally executed, and, as no proof was offered to show that it was blank, that proposition should not have been submitted as a question to the jury.

Because the verdict was against the evidence, against the law, and against the expressed opinion of the presiding judge.

Curia, per EARLE, J. Although the first ground taken in the notice of appeal does not present the precise question made in the argument, nor cover the whole ground occupied by the counsel, yet enough is collected from the report of the Judge and the admissions of the bar to authorize the Court to consider and decide:

1. Whether the plaintiff's counsel should have been allowed to cross-examine the witness Dawkins, as to former declarations made by him inconsistent with his oath in court, and then to call witnesses to prove those declarations.

2. Whether, after that evidence had been allowed, the other party, or the witness himself, should not have been permitted to sustain his oath in court, by proof of general good character.

The rules of evidence are generally well settled. They are the result of experience, and are framed for the purpose of eliciting truth in the most effectual manner, but also with a view to protect the witness from unnecessary assault. To secure parties from the consequences of falsehood, as well as to advance the ends of justice, it is necessary and proper that they should be allowed to attack the credibility of a witness called to testify against them; and there are three modes of doing this: 1. by proof through other witnesses that the facts are otherwise; 2. by evidence of general bad character, which would render him unworthy of credit; or, 3, as Mr. Phillipps expresses it, (1 Phil. Ev. ch. 8,) "by proof that he has made statements out of court, on the same subject, contrary to what he swears at the trial."

As to the first of these modes, it is obvious that it may be resorted to without in the slightest degree impugning the veracity of the witness, so long as men view the same transaction in different lights, form different conclusions from the same premises, pay more or less attention to the same occurrences taking place before their eyes, and have memories more or less retentive. A party must be allowed to show by witnesses called by himself, that facts are otherwise than as they are deposed by the witnesses called against him; and this, too, without being understood as so attacking the character of those adverse witnesses, as to let in evidence of general good character in reply. But it seems impossible to resort to either of the other modes without making a direct attack on the veracity and character of the witness. The proposition is direct, that he is unworthy of belief; from general infamy, in the one case, and in the other, that he either swears falsely on the trial, or was guilty of falsehood before. Such proof of former inconsistent declarations is always offered to discredit what the witness swears on the trial, and is held to be one of the most legitimate modes of doing so, as it is in fact one of the most common.

But, although this is perfectly reasonable and proper in regard to an adverse witness, it becomes another question when presented in regard to a party's own witness. The rule is universal, and founded in the strongest common sense and most rigid justice, that a party shall not be allowed to discredit his own witness, that is, to show that his witness is not worthy of belief; and this is a rule which seems to be indispensable, not so much for the protection of the adverse party as of the witness himself. "It would," says Mr. Justice Buller, (N. P. 297,) "enable the party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him."

It is true the meaning of this rule is restricted by Mr. Phillipps to proof of such general bad character as would make him unworthy of credit, (1 Phil. Ev. 213, ch. 8,) and this view receives some countenance from the Court in *Perry* v. *Massey*, (1 Bailey, 32,) but the position is not sustained by any of the cases. No doubt when a party calls a witness who swears differently from what was expected, he is not precluded from relying on other proof by other witnesses that the fact is not as his first witness deposed, although this may indirectly have the effect of bringing in question the credit of such witness: and he may, perhaps, resort to the previous admissions of the same witness, provided such admissions would, of themselves, have been competent evidence of the fact, independently of the personal bearing of the examination. Such was clearly the case of *Alexander* v. *Gibson*, before Lord Ellenborough, (2 Camp. R. 556;) and, in *Perry* v. *Massey*, the admissibility of the evidence of previous contradictory acknowledgments was rested, by the counsel who offered it, on the very ground that "Weaver's agency was established, and his acknowledgment of payment was evidence in the cause, independently of any purpose to impeach Weaver's credit." It would be extremely harsh to allow a party calling a witness to go further.

It seems in vain for counsel to disclaim the intention of impeaching the credit of Dawkins. He appeared to be a subscribing witness to the will. He was called to disprove the due execution of the will, or with the expectation that he would do so. He deposed differently, and proved the will to have been duly executed. The party who had called him had then a right, surely, to call other witnesses and prove the fact of non-execution, or to make it appear in any other way by evidence that was originally competent. But here, counsel were allowed to prove that Dawkins had on several occasions made inconsistent statements; and, to open the way to this proof, as in the case of impeaching the credit of an adverse witness, he interrogated the witness himself, concerning these statements. It is enough to determine this question to ask whether the declarations of Dawkins out of court, would have been competent in the first instance, or whether, after they were admitted, they were competent as independent proof. Certainly not. They could therefore serve no other purpose than to throw suspicion and discredit on the evidence of Dawkins, delivered at the trial. They were to show that his oath then was not entitled to credit, by convicting him of falsehood upon his former declarations.

Nor is it a sufficient answer to this reasoning, that the objection was waived by the adverse counsel. The rule is intended for the protection of the witness, and should not have been violated, even with the consent of the counsel.[2]

If Dawkins had been the witness of the other party, and his testimony had been impeached as it was here, I think he should have been allowed to call witnesses to prove his good character. Such evidence, in its direct tendency, is calculated to show that the witness is not worthy of credit. It is an assertion of his having spoken or sworn falsely, and his good character is a legitimate defence against the presumption that is raised against him. In *Rex* v. *Clarke*, (2 Stark. R. 214,) before HOLROYD, J., such evidence was allowed. There, the

character of the witness for the prosecution was impeached on her cross-examination, as to her conduct and deportment, and she was permitted to call witnesses to her good character. "Since," said HOLROYD, J., "the object of the cross-examination was to impeach the character of the witness, and to show that she was not credible. I do not see why such evidence may not be let in for the purpose of removing the impeachment of her character upon cross-examination, as well as if it had not arisen *aliunde*."

Nor can it make any difference that the witness was called by the party impeaching him. If the protection he was entitled to was withheld from him, it was due to him as a personal right to be permitted to sustain himself.

Independently of these errors in law, the Court is of opinion that this verdict ought not to stand; that it is not only opposed to the great preponderance of evidence, but that there is, in fact, in the whole report of the case, no proof of such undue and improper influence as should be allowed to invalidate a will. This phrase of *undue influence*, so frequently resorted to in this country, by disappointed relations, to avoid wills of persons on whom, while living, they had no claims, seems to me to be a modern innovation, and is not known in the English Courts. Every person of reasonable mind and sane memory may dispose of his property by will. It is a right secured by the municipal law, and exists in as perfect form as the right to transfer by sale or gift during life. The true inquiry always is, whether there exists the *animus testandi;* for, without that, the instrument purporting to be a will is of no effect in law. The party, therefore, must be free, and under no compulsion from such threat or violence as may reasonably be supposed to move a constant man. Even in case of such constraint or fear, if, when they are over, the testator confirms the will, it is made good. So, likewise, wills procured to be made by artful misrepresentations and fraudulent contrivances, are void. But it is not unlawful for

a man, by honest intercessions and modest persuasions, to procure a will to be made in his behalf;[3] and, according to the ecclesiastical law, importunity, in its legal acceptation, must be such as the testator is too weak to resist, and pressed upon him even to such a degree as to take away his free agency. These are the general rules on this subject; and, if they be applied to the case made by the proof, it will be very difficult to find the evidence either of threat, or violence, of fear, or compulsion, of artful misrepresentation, or fraudulent contrivance, of immodest flattery joined unto deceit, or of excessive importunity, extorting from the feebleness of age or disease, what it was unwilling to grant, yet unable to withhold.

The testator was an intelligent man, of strong mind, not yet greatly advanced in years, and only impaired in the vigor of his understanding by intemperance. He had no lawful wife, nor children, and had not lived in amity, at least not in continued amity, with his relations; and he has given his property to a stranger to his blood. This he surely had a right to do, and this is all that appears upon the face of the will.

When the executor and sole legatee proposes to produce the paper which contains the trusts, it is excluded, even by those who, in the argument to the jury, and to this Court, have urged that the will had ulterior and unworthy objects, and was made under the undue influence of a slave. We cannot, however, avoid seeing, through the face of the will, that the purpose was to provide a mode of bestowing the property on the issue of an illicit intercourse between that slave and himself. We do not choose here to speak of the indecency of such a connection, nor of the policy of permitting property to be given or devised in trust for the benefit of such persons. Until the Legislature thinks fit to interfere, we must have questions of this sort determined by the established rules of law.

Now, what facts, if proved, shall constitute undue or improper influence to avoid a will, I hold to be a question of law;[4] and I think, in cases of this kind, the particular sort of influence should be set down in the pleadings. That the testator was to a considerable extent under the influence of the woman in his domestic arrangements, is undeniable—as much, said one witness, as a man usually is under the influence of his lawful wife; yet it would not hold either with reason or law, to say that such an influence would avoid a will in behalf of the wife. Testator and the woman often quarrelled; she threatened to knock his teeth down his throat, cursed him for an old palsied rascal, rubbed her fist in his face, and dared him to open his mouth. These occurrences were during the paroxysms of mutual drunkenness, and really seem to be any thing but flattering speeches, or deceitful representations, or excessive importunity, used for the purpose of procuring a will to be made in behalf of her son. Indeed, all the proof of this kind referred to the year 1835, while the fact was that, as early as 1828, the testator had made a disposition of his property for precisely the same purpose, only appointing another executor. And this disposition of it was in conformity with the uniform tenor of his declarations from that period to the time of making the will under consideration. A disposition of property, though ever so capricious or unreasonable, will not be avoided on that ground alone. It is no lawful objection to a will that it does not dispense the testator's property to his relations, especially remote ones, unless deceitful arts have been used to estrange fixed affections. There is nothing of that kind here, and, however indecent and degrading was the connection of the testator with his slave, yet as he had issue by her, whose appearance seemed such as to secure him a *status* in society in another State, which he could not gain here, it is not perceived that there was any thing unreasonable or unworthy in

making such a disposition of his property as to promote that end.

After all, whatever sort of influence is alleged, to avoid a will, must appear to have been exerted for the purpose of procuring it to be made. Now there is not in this case any proof, except by Ellen Brock, that the woman Fan had any direct communication with the testator, on the subject of the mode of bestowing his property. "She said, before any of the Farrs should have any of the property, she would lose her life." This was in 1835, and, besides that the will in Judge O'Neall's hands was then made, it was no threat of violence to the testator to put him in fear: it was not the exercise of any of the arts alluded to, which may avoid a will; but only a strong expression of her dislike, and even that was after an expression of the testator's intention in her favor, proved by the same witness.

Upon the whole, the Court is of opinion, notwithstanding the learned and able argument of the counsel for the appellees, that to allow this verdict to stand would be, to let the jury run wild under the influence of prejudices and feelings which, however honorable and praiseworthy, must not be permitted to overthrow the rules of law, or divert the current of justice. The trial by jury would otherwise become an engine of capricious injustice, instead of the safe-guard of property. The motion for a new trial is granted, with the unanimous consent of the Court.

O'NEALL, J., declined expressing an opinion in this case.

Thomson and *Dawkins*, for the motion; *Herndon* and *Henry*, contra.

[1] S. C. again; 1 Sp. 93. *An.*
[2] Harp. 561; Appendix. *An.*
[3] 5 Strob. 192. *An.*
[4] 1 Sp. 101; Rice, 271. *An.*

EDMUND KENEDY AND WIFE *v.* JOHN CUNNINGHAM AND M. CHILDS.

The note of plaintiff, payable to *one* of two joint defendants, was not allowed to discount to an action on their joint note.

"To an action by two persons, the defendant cannot set off a debt due to him from one of them, nor can one of several joint defendants set off a debt due to him alone from the plaintiff."

Before EARLE, J., at Abbeville, Fall Term, 1839.

Sum. pro. on a joint note; to which the plaintiff's note to one of the defendants, on a separate demand, was offered in discount and allowed.

The plaintiff moved the Court of Appeals to rescind so much of the circuit decree as admitted the discount.

Curia, per BUTLER, J. The question here made is, can one, of two or more joint defendants, set off a separate demand due to him from the plaintiff. The authorities are very clear that a single defendant cannot set off a demand due to himself from one of a number of joint plaintiffs. It has been expressly decided in this State that, where partners sue an individual, the demand of that individual against one of the partners cannot be set off. (*Powrie* v. *Fletcher*, 2 Bay R. 146; *Lovel* v. *Whitridge*, 1 McCord, 7.) This proceeds on the ground that the plaintiffs, as partners, had no contract with the defendant. One of the plaintiffs having made the contract, he must keep it according to its merits; for, if the plaintiffs could be defeated by such a demand, they would have to make their co-partner their debtor for the debt and costs which they were compelled to pay for him.

The defence set off did not exist at common law, but has been allowed by, and depends on, statutory provisions; and, as a general rule, it may be laid down, that it cannot avail where there is wanting a mutuality of contract or dealing between the parties to the record. Although the debt sought to

be recovered, and that intended to be set off, need not be of the same nature or degree, to entitle a party to avail himself of this defence, yet it is necessary that they should be mutual and due in the same right. In the case of *Fletcher* v. *Dyche*, (2 Term R. 323–7,) Buller, J., in noticing an exception by counsel, seems to take it for granted that, where plaintiffs sue on a joint demand, a defendant cannot set off a separate demand against one of them, because there was not a mutuality of contract. He says, "the plaintiff's counsel objected to the set off because there was no mutuality:—but that depends on the question, whether the debt is due from the plaintiff and *another* person, or from the plaintiff *alone*. If the former, the debt cannot be set off."

The same principles are equally applicable to joint defendants. If one joint defendant could set off a demand due from a single plaintiff, he could defeat the plaintiff's demand by a contract which the plaintiff had never made with the parties to the record. Success would enable the defendant, who pleaded the discount, to defeat one person by making others his creditors; for he would have a right to look to his co-defendants for remuneration for paying their debt if they had been jointly liable with him. But, taking another view, suppose that the defendant, setting up the discount, makes an issue which results, by failure, in costs and expenses beyond those otherwise incident to the action. Who are to pay them? Not that defendant alone, but *all* are subjected to the costs of the suit.

Our discount law recognizes the defendant pleading a discount, as occupying the position of a plaintiff, and gives him the right to recover any excess which he may establish beyond the plaintiff's demand.[1] In this respect it is peculiar, and distinguishable from the English statute on the same subject. A. by pleading a discount, might enable B. and C. to recover a judgment against D. who never had had dealings with them.

The rule, analyzed and reduced to simplicity, is this;—to an action by two persons, the defendant cannot set off a debt due to him from one of them; nor can one of several joint defendants set off a debt due to him alone from the plaintiff.

According to these views, the circuit decision must be reversed, and the plaintiff be allowed to take a decree for the whole of his note.

The whole Court concurred.

Wilson and *Martin*, for the motion; *Wardlaw* and *Perrin*, contra.

See 2 Rich. 549. *An.*
See 4 Rich. 546; 5 Strob. 128. *An.*

GEOFFRY PALMER *v.* M. B. BOGAN.

The foreman of the jury in a slander case, who had used like words of the plaintiff to those on which the action was brought, was excused, against the defendant's consent, from sitting on the trial; and the defendant was not permitted, for that reason, to continue the cause.

Before O'NEALL, J., at Union, Fall Term, 1839.

This was an action of slander, in which the parties had expressed their readiness to go to trial, when the foreman, at the suggestion of the plaintiff's counsel, asked leave to retire from the jury, alleging that he had himself made a charge against the plaintiff similar to that which was the cause of the present action. The presiding Judge granted the leave, notwithstanding the vehement protestation of the defendant's counsel, The defendant then desired to continue the cause; but no motion was made to that effect, as the Court signified that it would not be allowed without the usual affidavits.

The verdict went for the plaintiff, and an appeal was taken, among other grounds,

Because the foreman had been excluded from the jury without the defendant's consent.

And because the defendant had not been allowed, on this account to continue.

Curia, per O'NEALL, J., said, "we are satisfied that the judge below exercised a proper discretion in excusing the foreman of the jury, and in ordering the case on to trial."

See further report of this case, 2 McM. 122. *An.*

CASES AT LAW,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA.

Charleston—February, 1840.

JUDGES PRESENT.

HON. RICHARD GANTT,
" JOHN S. RICHARDSON,*
" JOHN BELTON O'NEALL,
HON. BAYLIS JOHN EARLE,
" ANDREW PICKENS BUTLER.

EVANS, J., on the Circuit.

W. H. MACFARLAN *v.* LEVI P. MOSES.

The holder, in his action against the acceptor of a bill of exchange, failing to prove the handwriting of the first indorser, was nonsuited.

Before EARLE, J., at Charleston, Spring Term, 1839.

This was an action on a bill of exchange, drawn at Vicksburg, by one Moore, in favor of Wm. J. Day, at six months, and accepted by the defendant, who, on the maturity of the acceptance, refused to pay the bill. The name of Wm. J. Day was indorsed, but there was no evidence that the indorsment was made by him; and the only proof offered of the plaintiff's right to the bill was, that it had been sent by him to Charles M. Furman, Esq., to be collected; that Mr. Furman as agent of the plaintiff called with the bill, on the defendant, who accepted it. The defendant's motion for a

* During part of the Term.

nonsuit was refused, and the jury, under the instruction of the Court, found for the plaintiff.

The defendant appealed, renewing his motion for a nonsuit, and, in the event of that failing, moved also for a new trial, on the ground, that

The plaintiff ought to have proved the indorsement, to establish his property in the bill.

Curia, per BUTLER, J. The liability of an acceptor to pay a bill drawn to order, is to be distinguished from the right of one who presents it to receive payment. When a bill is presented for acceptance, the acceptor looks alone to the handwriting of the drawer, which he cannot afterwards dispute, but the holder's title depends on the order of the payee, and his handwriting must be proved to entitle the holder to receive payment.

In the case of *Smith* v. *Chester*, (1 T. R. 654,) it was expressly ruled, that in an action against the acceptor of a bill of exchange, it is necessary to prove the handwriting of the first indorser, notwithstanding such indorsement was on the bill at the time it was accepted. The case in Sayer, (p. 223,) relied on by the counsel for the plaintiff in this case, in which it was supposed that Lord Mansfield had held a contrary opinion, was commented on and considered by the Court in the case of *Smith* v. *Chester*. The judges there remark that the subject had been fully discussed and the law well settled; and the uniform current of decisions has conformed to the case last quoted.

The defendant, in strictness, was entitled to a nonsuit; but, to prevent further delay and litigation, which would be the consequences of another action, the Court has thought it advisable to grant a new trial.

RICHARDSON, O'NEALL and EARLE, JJ., concurred.

Phillips, for the motion; *Bailey* and *Brewster*, contra.

See 3 Rich. 384. *An.*

COMMISSIONERS OF THE ORPHAN HOUSE OF THE CITY OF CHARLESTON v. WM. MAGILL.

An assignment by Orphan House Commissioners, of the indentures of an apprentice, did not imply a covenant that the apprentice should perform the stipulations contained in them.

And to an action by the Commissioners against the assignee, upon a covenant by the latter, to pay certain liquidated damages, in case of dismissing the apprentice before the expiration of her term, the assignee shall not set up in defence the apprentice's non-performance of her stipulations in the indentures.

Before GANTT, J., at Georgetown, Fall Term, 1839.

Sum. pro. against the assignee of the indentures of an apprentice, Ann Delany, who had bound herself "as an apprentice for education," to the plaintiffs, "to dwell and continue in the said Orphan House, &c.—and from thence to dwell, &c., with such person as the said indentures might be transferred to, until, &c. And during the term aforesaid, the said Ann Delany to demean herself agreeably to the rules, &c., until the indentures are transferred; and, from thence, the person to whom such transfer is made, well and faithfully to serve, &c.—in all things well and faithfully to demean herself, &c."

To the defendant were assigned "the foregoing indentures, and all right, title, duty and term of her service" of the plaintiffs in and to the said Ann. Besides the usual stipulations in favor of the apprentice, there was a covenant by the assignee, to pay "the sum of sixty dollars, as liquidated damages," in case of her dismissal before the end of the term.

This action was brought for the sixty dollars, and was tried before a jury. The apprentice appeared to have been dismissed on account of immoral behavior; and the Court said, "that this was a good defence, and that the Commissioners, by assigning the indentures, covenanted for the performance by the apprentice, of all the stipulations contained

in them, and that on this depended the plaintiff's right to recover." Verdict for defendant.

The plaintiffs appealed for error in the Judge's charge, and on other grounds, the consideration of which was superseded by the decision of the Court upon this.

Curia, per RICHARDSON, J. Dr. Magill bound himself to pay sixty dollars, in case he should dismiss his apprentice, or return her before the end of her term, to the Commissioners of the Orphan House, without her consent. The defence admits that the Doctor did dismiss his apprentice, but did so because she was disobedient and vicious, and urges that the dismissal was therefore justifiable. The rejoinder to such defence is, that no matter what was the vicious conduct of the apprentice, Dr. Magill undertook, as master, to restrain or correct her misconduct, had lawful authority to do so, and if he failed of success, and dismissed her on that account, such dismissal presents an infraction of the contract—the reason why a certain sum in the nature of liquidated damages was fixed and agreed upon in lieu of uncertain damages, was, to prevent dispute in that very event.

The question between the parties is upon the strict legal construction of a contract of small amount, but involving important principles. If Dr. Magill had dismissed his apprentice even cruelly and wantonly, he would have had to pay but sixty dollars. And so on the other hand, if he failed to restrain her misbehaviour, and dismissed her for misconduct, however great, his penalty is the same. His literal covenant is to pay that sum, if she should be dismissed. But turn to the cause, motive, or end of the whole contract. The consideration for which Dr. Magill laid himself under such a penalty to the Commissioners of the Orphan House, was not that the apprentice should conduct herself orderly;—that depended upon the apprentice herself, and was made the duty of the Doctor so to require, from the moment he was

made master of one short of the age of legal discretion. The true consideration evidently was, that the Doctor was made the master of the apprentice, with all the rights, duties and advantages of a master, according to the laws of the State. Such assuredly was the warranty on the part of the Commissioners; in consideration of which warranty of the rights of a master, the Doctor laid himself under the penalty if he should dismiss or return the apprentice before the end of her term. It is the duty of every master to persevere, and strive to correct and improve his apprentice, *throughout* the whole term of service. When the Doctor yielded to her perverseness, and dismissed his froward pupil, he himself failed in his primary undertaking, and disappointed the end and motive of the Commissioners, and he cannot convert his own failure, whatever was the immoral conduct of his apprentice, into a legal defence against his covenant to pay a forfeit stipulated and agreed upon, in the event of his dismissing the apprentice at all. It follows then, rationally and satisfactorily, as well as from the letter of his contract to pay certain liquidated damages, that the Doctor entered into an independent covenant with the Commissioners, in no way bottomed upon any warranty for the good behavior of Ann Delany—but in consideration of the assignment made to him of the rights of a master. This assignment and the Doctor's covenant to pay sixty dollars in a certain event, were reciprocal considerations, each for the other.

If it be asked, is there no way for the master of a vicious apprentice to get rid of his contrrct, the answer is found in the Act of 1740[1] and that of 1789,[2] (P. L. p. 176 and 478.) These Acts provide that either the master or his apprentice may make complaint before two Justices of the Peace or a Judge, who may discharge the apprentice for sufficient cause. This has been adjudged in the case of *Belcher and wife* ads. *Commissioners of the Orphan House*, (2 M'Cord R. 24.) But to do so, requires a judicial trial, in which both parties are to be

heard, and neither party is competent to dissolve the contract upon his own mere motion. A new trial is therefore granted.

EARLE and O'NEALL, JJ., concurred.

GANTT, J., dissenting. In this case, the construction which was given to the covenant in question, was according to what appeared to be the obvious intention of the parties, as collected from the whole context of the several instruments before me. On the part of the plaintiffs, it became necessary to introduce certain letters of the defendant, Dr. Magill, to show that he had returned the apprentice to the Orphan House, contrary to the covenant entered into by him. In these letters, the defendant states particularly the reasons why he could no longer consent that she should remain with him, and they go to show very clearly that the apprentice had violated, on her part, the stipulations in the articles of apprenticeship entered into by her with the Commissioners, and assigned by them to Dr. Magill. Had there been the slightest evidence to show that the defendant had been guilty of any neglect in the discharge of his duty as the master of the apprentice, I should have promptly decreed against him, and from the possibility that this might have been the case, I thought it best to submit the matter to the jury, who better knew the parties than the presiding judge, and could therefore better adjudge respecting the credit which should attach to the evidence offered. I thought that if the defendant was not in fault, but had used the necessary endeavors to fulfil his duty towards the apprentice, and that the improper conduct of the apprentice had alone put it out of his power, there was no reason why the plaintiffs should recover the stipulated damages. This opinion was fully expressed to the jury, who found for the defendant, and I can see no reason why the verdict should be set aside.

Bailey, for the motion; *Harllee*, contra.

[1] 3 Stat, 544, made perpetual in 1783; 4 Stat. 540. *An.*

[2] 5 Stat. 137—an Act concerning Estrays, unconnected with this case. *An.*

JOHN MANNING *v.* S. WATSON, survivor of S. & J. Watson.

Damage in *transitu* is a good set-off to an action for freight.
And delivery to, and acceptance by the consignee, does not alter the case. (*Semble.*)
Any demand of the defendant, arising *ex contractu*, may be pleaded in discount; but not damages *ex delicto*.

Before the HONORABLE THE RECORDER of the City Court of Charleston, November Term, 1839.

Assumpsit for freight; to which was pleaded a discount for damage to the goods by leakage of the ship. The damage was not discovered till after the goods, which had been delivered apparently in good order, were unpacked. The jury found for the defendant's discount, and thereby established a considerable balance in his favor.

The plaintiff appealed, by motion for a new trial, on the ground,

"That the amount of damage alleged to be sustained by goods in their carriage, is inadmissible as a set-off in an action for freight, after delivery of the goods to, and acceptance of them by the consignee."

Curia, per O'NEALL, J. The plaintiff's motion is concluded by the case of *Ewart* v. *Kerr*, (Rice R. 203.) But, apart from that authority, there could not be a doubt of the defendant's discount being a proper one. It has long been the practice to allow the injury done to goods in transportation to be set off against the claim for freight. The defendant's cross demand arises *ex contractu*, and, as such, may always be set up in discount under our law, (P. L. 246; 4 Stat. So. Ca. 76,) which admits "any account, reckoning, demand, cause, matter, or thing." If the damages arise *ex delicto*, they cannot be so set off; and this distinction, if kept in mind, will prevent the profession from supposing that

there is any conflict between the case of *Ewart* v. *Kerr* and that of *Johnson* v. *Wideman*, (Rice R. 325.)

GANTT, RICHARDSON, EARLE and BUTLER, JJ., concurred.

Yeadon and *Macbeth*, for the motion; *Walker*, contra.

See 10 Rich. 320. *An.*

A. S. MARVIN *v.* COLIN McRAE, survivor of C. McRAE & Co.[1]

The general count for money had and received, in an action brought upon an interest-bearing demand, carries interest.

"It was not necessary to count upon the interest, for it is an incident of money had and received, and does not depend upon an express promise."

Before EVANS, J., at Marion, —— Term, 1839.

This was an assumpsit, which went to the jury upon the general count, for money had and received, a special count having been overruled on demurrer at a previous term, and the Court of Appeals having determined that, upon this general count, the plaintiff might recover. (See the case in Rice R. 171.) The following statement, upon which the case was now brought up, is extracted from the report of the circuit Judge upon the former appeal.

"Mr. Cohen was the only witness, and deposed that Colin McRae and George C. Brown, composed the firm of Colin McRae & Co. Brown was arrested in the Federal Court, at the suit of the plaintiff, for a large amount, and transferred to the witness, as the agent of Marvin, many notes, and among them the note which was the subject of this suit, given by C. McRae & Co. to George C. Brown himself. Shortly afterwards, and before it became due, Mr. Cohen saw McRae and informed him that he held this note, and also of the circumstances under which he held it and had obtained it. McRae

replied, "that in the settlement of the concern of McRae & Co. he would retain money enough to pay the note." Cohen saw him frequently, and he repeatedly made the same promise. On the 17th March, 1835, after the death of Brown, saw him, and asked him for the money. He replied, that he had settled with Brown, and told him that he (McRae) must retain money to pay this debt. Brown had said, "never mind, allow me to take the money and I will pay the note," and he, McRae, had permitted Brown to do so. The witness stated that he was induced entirely by the promises of McRae not to proceed against Brown, from whom he might have collected the money. The note was for three hundred and thirty-eight dollars, dated January 9, 1831, signed C. McRae & Co., payable to George C. Brown or order, at sixty days, and not indorsed."

The jury found for the amount of the note, with interest from the settlement between McRae and Brown, in 1833.

The defendant, upon appeal, moved to review the former decision of the appeal court; as well as for a new trial, on the ground,

That the plaintiff ought not to have recovered interest, or damages in lieu of interest, on a general count for money had and received.

Curia, per O'NEALL, J. The well considered opinion of this Court, to be found in Rice's Rep. 171, decided that the plaintiff was entitled to recover. We do not think that we ought to yield to the application to review that decision. The only question which is now to be considered is, whether the plaintiff is entitled to recover interest on the count for money had and received. I have no doubt he is. It was so ruled in *Bulow* v. *Goddard*, (1 N. & McC. R. 45;) *Barrelli, Torre & Co.* v. *Brown & Moses*, (1 M'C. R. 449.)[2] It is true, that in the first of these cases, the right was put upon the ground of the defendant having forced the plaintiff to pay him money which he was not entitled to receive. In the other no quali-

fication was suggested; though, as it was not necessary to the decision of that case, I concede that it is not conclusive authority. But I think the rule there stated has been ever since followed. If, however, there never had been a decision upon the subject, there could not be room for a well-founded doubt about it. The use of money is always worth the legal rate of interest. He who receives the money of another, is to be regarded as using it, unless it appears that he received it under such a character, or in such a way, that he could not use it without violating his duty. He who receives the money of another without any right to retain it, will not be supposed to keep it without putting it to use. The fact of the party being deprived of that which would produce interest, generally entitles him to demand it. It is so in all cases of contract, where payment of a certain sum is delayed after a time limited by writing. In the action for money had and received, the defendant is considered as in the actual use of the plaintiff's money, until the contrary appears. The use of it establishes the plaintiff's right to interest; and it is perfectly immaterial whether a legal implication, or express evidence, establishes the conclusion that the defendant is in the use of it. This action likewise proceeds upon the notion that the defendant withholds from the plaintiff money to which he is entitled. In either of these points of view, the plaintiff is clearly entitled to interest.

In the case before us, there is still less difficulty, for the demand of the plaintiff against the defendant and Brown was an interest-bearing demand. When he made himself liable for its amount, he took it with all its consequences; and in parting with the fund out of which he had promised to pay it, he deprived the plaintiff of the use of that which would have produced interest to him.

It was not necessary to count upon the interest, for it is an incident of money had and received, and does not depend upon an express promise. Where interest is sought to be

recovered upon a book account, its recovery depends upon a promise in fact, and it is, for that reason, necessary to declare on such promise.[3]

Motion dismissed; GANTT, RICHARDSON, EARLE, and BUTLER, JJ., concurring.

Munro, for the motion.

[1] S. C. before; Rice, 171. *An.*
[2] See 5 Rich. 298; 2 Sp. 30; 8 Rich. 291; 7 Rich. 120, 125. *An.*
[3] See 7 Rich. 25; 2 Sp. 33. *An.*

W. MACFARLAND *v.* ALLEN N. DEAN.[1]

The declaration averred an assault on the plaintiff, "while sitting in his gig." The replication represented the defendant in the gig, "and the plaintiff gently laid hands on him to put him out," and the assault:—held not to be a departure; for both allegations, though apparently discrepant, might be true, as they did not necessarily refer to the same exact point of time.

Plea to assault and battery, *son assault demesne;* which the replication confessed and avoided. The rejoinder substantially reiterated the plea, and was held bad for not traversing the replication.

Approved precedents are to be followed, and a rejoinder wantonly deviating therefrom, held bad.

The effect of a judgment in special demurrer is, only, that the party cast shall plead over or amend on payment of costs; so, his demurrer having been overruled, to a rejoinder concluding to the country, he should be allowed to add the similiter and go to trial.

"I am not prepared to hold that a judgment for the defendant in demurrer as to one count in the declaration, would deprive the party of a right to judgment on a verdict found on the other counts."—(*O'Neall, J.*)

Before BUTLER, J., at Coosawhatchie, Fall Term, 1839.

This case came up to the Appeal Court on a demurrer to the plaintiff's rejoinder, which was overruled in the Court below. Its history is very fully detailed in the opinion of the Court.

Curia, per O'NEALL, J. The plaintiff declared, 1, for an assault and battery committed by the defendant upon him, while sitting in his gig or chaise, by leaping upon the shaft,

breaking it off, and beating or wounding him therewith, and special damages; 2, for a beating and wounding generally, with special damages; 3, for beating and wounding generally; 4, for breaking the plaintiff's gig. To this declaration the defendant pleaded the general issue, and to the first count, *son assault demesne*. To the general issue, the plaintiff added the similiter; to *son assault demesne*, he replied specially, confessing the first assault, but avoiding it by stating, that the defendant was in the said gig or chaise of the plaintiff making a great noise; and the plaintiff, upon his refusing to leave it after request made, gently laid his hands upon him to expel him, as he lawfully might, and that this is the assault pleaded; and then the plaintiff alleged a beating and wounding by the defendant, as in the first count, and averred that the same was outrageous and excessive. To this the defendant rejoined, as follows:

"And the said Allen N. says, that the plaintiff, on the day and year, and at the place above mentioned, made an assault upon the said Allen N. with an intent to beat and wound him, as he has above alleged, and of this he puts himself upon the country." To this the plaintiff demurred, and assigned for cause of demurrer, 1, that the rejoinder did not, by apt and proper words, refer to the replication; 2, that it did not answer or deny the replication; 3, that it departed from it; 4, that the rejoinder was not certain, direct and positive; 5, that it was otherwise informal and defective. The defendant joined in demurrer, and the Court below overruled it.

The plaintiff then went to trial on the other counts, the Court instructing him that, if a case was not made out, upon them, differing from that set out in the first count, the judgment for the defendant in demurrer, would preclude a recovery. The jury found a verdict, on evidence which the presiding judge thought was strictly applicable to the first count, for three hundred dollars damages; notwithstanding

which, judgment of *nil capiat* was given in favor of the defendant.

The plaintiff appeals, and insists that the judgment below was erroneous; and, even if that was right, that yet he was entitled to have judgment for his damages found by the jury.

I have bestowed a good deal of reflection on these pleadings, and think the plaintiff's replication good, and the defendant's rejoinder bad. The replication is in exact conformity with a precedent in 2 Chitty Plead. 691. In 1 Chitt. Plead. 563, the rule is stated, "if the plea be true, the plaintiff must reply specially the matter in avoidance of it;" and it is said, "if the battery was outrageous, or more than was necessary for self-defence, the matter should be so replied." These rules are complied with on the present occasion. The only plausible pretence that it is defective, is that it states as the cause of the plaintiff's assault a matter different from that stated in the first count. In it the plaintiff is represented as sitting in the gig when the defendant made the assault—in the replication, the defendant is represented as being in the gig, making a great noise, &c. This might be a departure, if both statements could not stand together. But they admit of this construction: that the plaintiff was seated in the gig when the defendant intruded himself into it, making a great noise, &c., and would not leave it after request; and then that the plaintiff, laying his hands upon him, put him out, upon which the defendant leaped upon the shaft, broke it, and beat the plaintiff. This makes the replication fortify and support the declaration.

The rejoinder is defective, as it does not refer by apt and proper words to the replication. The form is given in 2 Chitt. Plead. 718, and approved precedents in pleading are to be followed. It was defective too in not traversing the facts stated in avoidance of the plea of *son assault demesne*.

It is, if it alleges anything properly, a mere reiteration of the plea, and cannot therefore be an answer to that which

confesses and avoids it. I am, therefore, satisfied that the judgment below ought to have been in favor of the plaintiff in demurrer.

But if it was properly given for the defendant, still it was not a final judgment which could bar the plaintiff's recovery. A judgment in special demurrer is nothing more than that the party against whom it is pronounced should plead over or amend on payment of costs;[2] so here the effect of it was to hold the rejoinder good, which had concluded to the country—and then the plaintiff ought to have been permitted to add the similiter. On looking at the record, I find the similiter to the rejoinder is added, and therefore the record is perfect, and the plaintiff is entitled to his judgment. I am, however, not prepared to hold with the judge below, that a judgment for the defendant in demurrer, as to one count in the declaration, would deprive the party of a right to judgment on a verdict found on the other counts.

The annotations of the learned editor of Saunder's Reports, (1 Saun. 80, note 1,) *Lawe* v. *King*, does not justify that conclusion. In it, it will be remarked, that although he speaks of different issues, yet, he intends to speak of issues made up on several pleas to the whole case: and not when there is a plea to one count, and another plea to the whole case. In *Cook* v. *Sayer*, (2 Burr. 749,) the general issue and statute of limitations were pleaded: verdict went for the plaintiffs on the general issue, and judgment for the defendant in demurrer on the statute. It was held very properly that, notwithstanding the verdict, the plaintiff was barred by the statute, and judgment of *nil capiat* was awarded. But this is not the case here. The plaintiff may, for aught that appears on the record, be barred upon the first count, and still be entitled to judgment on the others. *Son assault demesne* could not justify the breaking of the plaintiff's gig, of which the fourth count complains.

The motion to reverse the decision below is granted, and

the plaintiff has leave to enter up judgment for his damages found by the verdict.

GANTT, RICHARDSON and EARLE, JJ., concurred.

Martin for the motion.

The following outline of his argument was kindly furnished by the appellant's counsel; but the peculiar form in which the case is reported, leaves no place for it except as a note.

"The rejoinder is defective in form, (3 Chit. Plead. 1232,) and therefore bad, (Com. Dig. Abatement G. 1; 1 H. Blk. R. 1; 1 Bos. & Pul. ; 5 East 272; 3 Barn. & Ald. 448; 6 East 272; Gould's Plead. 466,) on *special demurrer*. (1 N. & McC. 171.)

"It does not completely answer the replication, *which it ought to do*, (3 Tom. Law Dic. 122; 4 Com. Dig. Pleader; Id. Ibid. E. 1; 1 Saund. R. 28, note 3; 4 Saund. R. 62,) but departs therefrom, inasmuch as "the party deserts the ground that he took in his antecedent pleading, [*son assault demesne,*] and resorts to another," [a general assault without any specification of its nature,] (Co. Lit. 304; 2 Saund. 84,] as well as, also, that "he puts the same facts on a new ground in point of law." (2 Saund. 408.) It is also vague and indefinite in the description of the trespass.

"But the rejoinder went only to the first count, and the plaintiff had a right to what he could prove under the rest; and at any rate, he should have been allowed to plead *de novo* on payment of costs. (1 N. & McC. R. 64.")

[1] *Dean* v. *Horton;* 2 McM. 147. *An.*

[2] See 5 Rich. 361; 10 Rich. 371; 2 McM. 170; 7 Rich. 432; 1 N. & McC. 88. *An.*

HENRY B. TOOMER *v.* THOMAS O. DAWSON.

An entry in a broker's sale book, with the consent of both parties, of the terms of an agreement for the sale of land, if not in itself a sufficient memorandum under the statute of frauds, may be so connected with a subsequent letter from the vendor, in reference to it, as to make it good against him.

"I am, however, far from conceding that the memorandum made by the direction of one party, and acquiesced in by the other, was not sufficient to bind both."—(*Butler, J.*)

Before O'NEALL, J., at Charleston, January Term, 1840.

This was an action of assumpsit against the purchaser, on a contract for the sale and purchase of a plantation.

The plaintiff and the defendant met, on November 28, 1838, at the office of Elliott & Condy, who had been employed by the plaintiff to make the sale of the property in

question. Mr. Elliott, at the plaintiff's request, who dictated the terms, and in the presence of the defendant, who saw it done, made the following entry upon his sale book.

H. B. Toomer.	Plantation in St. Andrew's Parish, $7,000. Titles 1st. January.		T. O. Dawson. 28th. Terms, ⅓ payable
	Commissions,	70	1st. July—balance
	Advertising,	7 15	in 1, 2, and 3 years.
	Papers,	20	

On December 20, the defendant wrote the following letter to the plaintiff:

"Dear Henry,—I have seen my cousin, and he thinks there are objections to your title: and I now inform you, that I expect you, on the first of January next, to deliver me possession of the plantation, and at the same time to furnish me with good titles, and that I will be ready to comply with my part of the contract. Should you fail to comply with your part of the contract at the above-mentioned time, I shall not hold myself bound by the agreement entered into.

"Yours, &c., T. O. DAWSON."

On the part of the defence, it was insisted that this was not a sufficient contract under the Statute of Frauds; and upon a verdict being found for the plaintiff, the defendant appealed on that ground.

Curia, per Butler, J. Both parties were present when the entry was made. The plaintiff stated the terms of the contract in the presence of the defendant, and they were entered in the book accordingly. The terms were specifically set down in writing, by the tacit consent of the defendant, and the express direction of the plaintiff, by a third person, in books kept by him for the purpose of transferring property from one person to another, or rather, for entering the terms of contracts on which sales were to be perfected. Such an entry, therefore, must be regarded, at least, as a memorandum in writing; and, if the party to be charged, subsequently refer to it, by letter or other writing, as a contract, he adopts it, and

subjects himself to all the liabilities that such a contract would have imposed upon him, if he had signed it when first made.

The case of *Saunderson* v. *Jackson et al.*, (2 Bos. & Pul. 238.) is full to the point. The plaintiff had bargained with the defendants for some gin, which the latter refused to deliver. The plaintiff had received from them the following bill of parcels. "London.—Bought of *Jackson & Hankin*, distillers, No. 8, Oxford-street," (so much in print; then followed, in writing,) "1,000 gallons of gin, 1 in 5. Gin 7*s.* 350*l.*" About a month after, the defendant wrote this letter: "Sir: We wish to know what time we shall send a part of your order, and shall be obliged for a little time for the delivery of the remainder." Lord Eldon, Ch. J., said: "This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract within the Statute of Frauds. The single question therefore is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name as well as his written name. At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the Statute of Frauds. For, although it be admitted that the letter, which does not contain the terms of the agreement, would not alone have been sufficient, yet, as the jury have connected it with something that is, and the letter is signed by the defendants, there is then a written note, or memorandum in writing," &c. The case under consideration cannot in principle be distinguished from the above. On December 20, the defendant wrote a letter to the plaintiff, referring to a contract that had been made; and the jury, by their finding, have connected it with the memorandum in the books of Elliott & Condy, which sets out the terms of the contract. So that, even allowing that neither the memorandum itself, nor the letter, separately, would have been sufficient, yet they were so when taken together.

I am, however, far from conceding that the memorandum made by the direction of one party, and acquiesced in by the other, was not sufficient to bind both; but it is unnecessary to go so far to decide the point involved in this case. For authorities upon it, see 4 Bos. & Pull 252, and 5 Harris & Johnson R. 117.

EARLE, J. In addition to the views presented by Mr. Justice BUTLER, in which I concur, it may be added, as another reason for sustaining the judgment below, that section sixth of the Vendue Act[1] requires auctioneers to keep a book in which shall be fairly written and entered all vessels, lands, houses, slaves, or other articles "by them sold or disposed of, either at public outcry or by private sale." If any entry so made of a sale at auction, would be binding, which I think has never been questioned,[2] there is no good reason why an entry in compliance with the provisions of the Act, of a sale by private agreement, negotiated through the agency of the auctioneer, and made in the presence of the parties, should not be considered equally binding. The terms were agreed on in the presence of the auctioneer, and he entered the sale at the time, and in the presence of the defendant, which I consider a sufficient authority under the Act, and as binding on the defendant.

Motion dismissed; O'NEALL and EARLE, JJ., concurring; GANTT, J., dissenting.

Bailey, for the motion; *Grimke*, contra.

[1] 4 Stat. 671. *An.*
[2] See 3 McC. 458, and Notes, Dud. 142. 1 McM. 256. 5 Strob. 130. 10 Rich. 63.
[3] See 3 Strob. 233-5. *An.*

DAVID SEASTRUNK, (Pay-master 18th Regiment) *v.* HENRY W. RICE, (Sheriff of Colleton District.)

Where a militia execution (under the A. A. 1835, p. 18,) directed the Sheriff to levy

a certain *per centage* on the general tax of the delinquent, the Sheriff was bound to ascertain the amount and collect it.

The Sheriff is not entitled to any fee on a militia execution, under the A. A. 1835, except where the fine has been collected.

So determined by BUTLER, J., *at Waterboro'*, *Fall Term*, 1839, upon a rule, calling upon the Sheriff to show cause why he had not collected and paid over certain militia fines embraced in three executions issued by the Colonel of the 18th Regiment. The Sheriff returned that he had collected on said executions the sum of thirty-three dollars and fifty cents, but claimed to retain this amount, to pay costs, which the 18th Regiment owed him for cases sent out, and returned *non est inventus*, or remitted by the Colonel. This return was objected to—1. Because the Sheriff has no right to retain money collected, to pay costs not on the face of the execution. 2. Because the executions above mentioned, direct the Sheriff to collect twenty, and in some cases fifty, per cent. on the general taxes of the persons fined, which the Sheriff had failed to do, contending, that he was not required, by law, to ascertain the amount of taxes paid by persons fined; and to sustain this position, relied on Sec. 10 A. A. 1813, (p. 9,) and Sec. 3, A. A. 1809, (p. 35.)[1] To this, it was replied, that the Act of 1835, page 19, Sec. 3, prescribes the precise manner in which the execution shall be drawn, deprives the Court Martial of the power of fixing the amount of assessment, and leaves this duty solely for the Sheriff to perform.

The objections to the return were sustained, and the rule was made absolute. The Sheriff moved the Court of Appeals to set aside the rule; but his motion was dismissed on the grounds stated above.

[1] 8 Stat. 520; Id. 516, § 5; Id. 582. *An.*

THE CITY COUNCIL OF CHARLESTON *v.* JOHN BRANDT.

In an action for a penalty, under a City Ordinance against negroes being permitted

assemble or loiter in any shop longer than while actually engaged in lawful trading, proof that negroes remained for two hours in and about the defendant's premises, threw on him the burden of showing that they were not there unlawfully.

Before his Honor the RECORDER of the City of Charleston, April, 1839.

Sum. pro. to recover a penalty of twenty dollars, for violation of a City Ordinance, of November 26, 1836, Clause 22, viz. "That no negroes or persons of color, whether bond or free, shall be permitted to assemble or loiter in any shop, or in or about the door thereof, and shall not be allowed to sit down or remain therein longer than while actually engaged in purchasing such articles they may be lawfully authorized to purchase."

The evidence was, that on Sunday morning there was a concourse of negroes about defendant's shop; that they continued in and about it during nearly two hours that witness observed them. Witness could not see, but heard those inside laughing and talking, and supposed there were eight or ten of them. Defendant kept his gate closed, and, from time to time, opened it to let negroes in or out. Amongst others, he let out certain negroes described in the process.

The Hon, Recorder charged the jury that the evidence raised such a presumption against the defendant, as imposed on him the necessity of proving that the negroes about his premises were not there unlawfully.

Verdict for the City.

The defendant appealed, for error in his Honor's charge; but,

Curia, per O'NEALL, J., held that the jury had been properly instructed.

T. J. IVY *v.* H. WILSON.

The defendant's steamboat being about to run foul of that of the plaintiff, a slave of the latter was mortally injured in an attempt to prevent the collision. Some showing was made by the defendant, that the negro had wantonly exposed himself to the danger; but the jury were instructed that such a presumption ought not to be admitted in the case of a slave protecting his owner's property, without clear proof.

Before O'NEALL, J., at Charleston, January Term, 1840.

This was an action by the Captain of the steamer Dudley, against the Captain of the steamer Neptune, for a mortal injury to the plaintiff's slave, occasioned by the collision of the two boats. The Neptune, in coming in to her accustomed landing, fell foul of the other vessel, which was moored to a wharf immediately below. Whether this accident was a natural and unavoidable causalty, or the result of negligence or want of skill, was the subject of much conflicting and very contradictory professional opinion.

When the Neptune was within a hundred yards of the Dudley, the plaintiff ordered up all hands to assist in bearing her off and preventing the collision. Among them was the plaintiff's slave, George, described as a bold, ambitious, adventurous fellow, who got on the guard of the boat, outside of the bulwarks, and, though warned to avoid danger, remained in that position till one of his legs was caught and crushed between the two vessels. In consequence of this injury, he soon afterwards died. Capt. Marshall, the pilot of the Dudley, testified that George's position was a proper one to prevent the collision, but was one of great danger, and that, in assuming it he violated one of the first laws of nature, self-preservation: but, examined in reply, he said that that was what every sailor did in discharge of the perilous duties of his vocation. The slave was worth from one thousand to twelve hundred dollars.

The jury were instructed that, to make the defendant lia-

ble, the collision must have resulted from his intention, his want of skill, or his negligence in navigating his vessel. Nor would he be liable if the negro had exposed himself to the danger unnecessarily; but the Court said, if they believed that the negro's position was taken to protect the owner's property (the boat) from injury, that they ought not to presume that he wantonly exposed himself to unnecessary danger. That conclusion ought to be plainly established by proof before they adopted it.

Verdict for the plaintiff, seven hundred and fifty dollars.

The defendant appealed on the ground that the verdict was against evidence; and,

That his Honor erred in charging that the negro ought to be presumed not to have wantonly exposed himself.

Curia, per O'NEALL, J. We think the instructions given to the jury, by the judge below, were proper.

The jury had evidence upon which they might conclude the defendant was guilty of negligence? if so, the verdict is right.

Yeadon and *Macbeth*, for the motion; *Meminger* and *Jervey*, contra.

See 5 Rich. 26; 2 McM. 408. *Ed.*

THE STATE *v.* BENJAMIN WINDMAN.

An indictment for stealing twenty-five head of cattle, (against the A. A. 1789, P. L. 486; 5 Stat. So. Ca. 139,) having been sustained only by evidence of a less number, and the jury having found a general verdict of guilty, a new trial was ordered. If the objection had been made in time, the judge on the circuit would have sent the jury back to amend their verdict.—(*Butler, J.*)

Before BUTLER, J., at Williamsburg Spring Term, 1839.

The defendant was indicted for cattle stealing. The in-

dictment charged, in one count, the stealing of five bulls of the value of fifty dollars, five cows of the value of fifty dollars, five oxen of the value of fifty dollars, five steers of the value of fifty dollars, and five calves of the value of twenty-five dollars, of the goods and chattels of Theodore L. Gourdin and William Lefrage, against the Act of the General Assembly, &c.; and in the second count, the stealing of the same kind and number of animals of the goods and chattels of a certain person, to the jurors unknown, against the said Act, &c.

The evidence, which it is not necessary to detail, did not embrace, at the utmost, more than five or six, and was not definite, except as to three head of cattle, the property of Gourdin and Lefrage.

The presiding Judge instructed the jury, if they found the defendant guilty, that they should state in their verdict the exact number of cattle stolen, so that the definite judgment might be pronounced according to law. "The jury returned a general verdict of guilty; and, not having it brought to my attention particularly at the time, I did not send them back to correct, or rather to make it more explict, which I would have done if I had been called to the subject before the verdict had been recorded."

The defendant appealed, on the ground,—

That the general verdict, of guilty of the whole charge, was clearly against evidence.

Curia, per BUTLER, J. This verdict, enforced according to its strict import, would subject the defendant to penalties beyond his actual guilt, and is too indefinite to authorize the judgment of the Court. In the case of *The State* v. *Herring*, (1 Brev. R. 159,) it is determined "that on an indictment for larceny of several articles of the same kind, for each of which there is a specific penalty, if a less number be proved than that laid in the indictment, and the jury find a

general verdict, a new trial will be granted." So a new trial must be ordered in this case.

The whole Court concurred.

Moses for the motion.

See 2 N. & McC. 442. *An.*

THE STATE *v.* HENRY BOICE.[1]

An indictment (under A. A. 1817 and 1834,) for selling liquor to the slave of William Patton, charged the selling to have been without "a written order of or from the said William *Boice*," (instead of *Patton, the owner*,) "or of or from any other person having charge or management of said slave." After verdict of conviction, judgment was arrested.

Before EVANS, J., at Charleston, January Term, 1840.

This was an indictment for selling spirits to a negro, the slave of William Patton. Verdict *guilty*.

The defendant appealed, and moved in arrest of judgment on account of a defect on the face of the indictment.

Curia, per RICHARDSON, J. The indictment charges that the defendant Henry Boice, did sell and deliver, to a certain slave of William Patton, spirituous liquor, &c., "not having a written order of or from the said William *Boice* (instead of *Patton*), or of or from any other person having the care and management of said slave, to sell or deliver the said spirituous liquors to the said slave," &c.

Both the A. A. 1817, (p. 25,) and A. A. 1834, (p. 12,)[2] under one or both of which this indictment is preferred, prohibit such selling and delivery to a slave, without the written order of the owner, or of some person having the care and

management of the slave. Now, indictments upon statutes must state all the facts and circumstances which make up the definition of the offence, so as to bring the party accused precisely within the statute, (*The State* v. *Foster*, 3 M'C. 442; *The State* v. *O'Bannon*, 1 Bailey R. 144,) and nothing can be taken by mere intendment.

In the indictment before us, the trading is charged to have been without the order "of the said *William Boice*, or of any other person having the care or management of the said slave." There is no negation of Boice having had the written order of the *owner*, *William Patton*, without which averment the offence defined by the statute is not set forth completely in the indictment; for it might be, for aught that appears, that the defendant did have such an order, which would take his case out of the statute.

Judgment arrested; GANTT, BUTLER and EARLE, JJ., concurring.

Yeadon and *Macbeth*, for the motion; *Bailey*, contra.

[1] *State* v. *Boice & Stuke*, 1 McM. 189, 191. *An.*
[2] 7 Stat. 454; Id. 468; 6 Stat. 516. *An.*

THE STATE *v.* D. N. INGRAHAM.

A commissioned officer in the United States Navy, is not exempt from Jury service. All previously existing exemptions are virtually repealed by the *Jury Law* of 1799.

Before EARLE, J., at Charleston, May Term, 1839.

The defendant, a lieutenant in the navy of the United States, was a citizen of South Carolina, resident in Charleston, and owned property there. Being on furlough, and at home in the city, he was summoned to serve as a juror, and made default. On the return of a *scire facias*, he showed

cause and claimed exemption from that duty, by virtue of his commission in the United States service. The Court adjudged the cause to be insufficient, and fined him accordingly.

This order the defendant moved the Court of Appeals to rescind.

Curia, per O'NEALL, J. The defendant rests his title to exemption on section 18 of the A. A. 1731, (P. L. 126, 3 Stat. So. Ca. 278,) which exempts from serving on juries "all persons who heretofore have been, now are, or hereafter shall be, members of his majesty's council, judges or assistant judges, in any of the courts of this province, and all members of the Assembly, and officers of any of the courts of justice, during the time they shall be members, and during their continuance in such office, and all persons exempted by the laws and statutes of Great Britain." It may be conceded that, according to the laws and statutes of Great Britain, the defendant would be exempted; but this will not help him; for the A. A. 1799, section 6, 7, and 8, (1 Faust, 264,)[1] contains provisions totally repugnant to the clause recited from the Act of 1731, and must therefore be regarded as a repeal of it. Section 6 provides that, from the tax return of every third year, new jury lists shall be made, containing the names of such persons as were entitled, by the article of the Constitution then of force, to vote for members of the State Legislature, and those names are directed to be put in the division of the jury box numbered *one*. Section 7 provides, that out of those names shall be drawn the grand, petit and pleas jurors, who are to be summoned and impannelled as jurors then were. Section 8 declares, "that a juror who shall be legally summoned to appear and serve at any of the Courts established by the Act hereby to be amended, and shall neglect or refuse so to do, shall forfeit and pay a sum not exceeding twenty dollars and seven per cent. upon his general State tax for the year preceding, unless such person shall show

good and sufficient cause of excuse, *upon oath*, to any of the said judges, at the next sitting of the Court after the sitting to which such person shall have been summoned to serve as aforesaid." This provision, taken in connection with sections 6 and 7 of the same Act, swept away all previous exemptions; and every free white man of the age of twenty-one years, being a citizen of this State, and having resided therein two years previous to the general election, preceding the time of his being summoned as a juror, and who has a freehold estate of fifty acres of land, or a town lot of which he has been seized and possessed six months before such election, or not having such freehold or town lot, if he has been six months before such election a resident in the district in which he may be called to serve, and has paid a tax the preceding year of three shillings sterling, towards the support of this government, (*see* Const. So. Ca. Art. 1, Section 4, and *The State* v. *Massey*, 2 Hill R. 379,) is now liable to serve as a juror, unless he can show that since the Act of 1799, he has been by law exempted.[2]

Because a man is liable to serve as a juror, it does not follow that he will be inexorably required so to do, when his other public functions conflict with the discharge of this duty. On making proper application, he will be excused. But the defendant was not in actual service, so that his duty to the United States could not conflict with his duty as a juror; and I think a little service in the jury box might not be useless to one of the gallant sons of the stormy deep, who is often called upon to bear his country's standard to far distant shores. As a juror, he would learn much of the civil institutions of his country to which he was before comparatively a stranger, and he would thus have it in his power to compare them with foreign institutions, or with more perfect knowledge to protect some fellow-citizen's right against the aggression of foreign governments.[3] This duty, instead of being regarded as an onerous one, ought to be cheerfully and

promptly borne by every man, the rich and the poor, the high and the low. The perfect equality of the jury box is the best practical exposition of legal liberty. To it we are perhaps indebted for the noble heritage which our ancestors of '76 won for us by blood and toil. To it we shall look, with conscious security, for the preservation of life, liberty and property, as long as it exists. These considerations, addressed to a reflecting people, who prize their rights and love their country, will make every man court instead of shunning the discharge of the duty of a juror.

The order of the Court below was confirmed; RICHARDSON, BUTLER, and EARLE, JJ., concurring.

Peronneau, *Mazyck* and *Finley* for the motion.

[1] 7 Stat. 291. *An.*
[2] Act of 1857; 12 Stat. 661. *An.*
[3] Captain Ingraham and Martin Koszta, 1853. *An.*
Post, 212. *An.*

CHARLES EDMONDSTON AND JAMES L. PETIGRU *v.* JOHN J. HUGHES.

A deed thirty-five years old was allowed to go to the jury as evidence, upon proof of the handwriting of the two subscribing witnesses, who were dead, and of its having been duly registered in the proper office.

After proof of the signatures of the subscribing witnesses, who are dead, "it would seem, that it is not necessary to prove the grantor's handwriting; for his signature, seal and delivery are proved when the handwriting of the witnesses is proved. But it is usual to prove his handwriting, and where it can be done, it is safest and best to do it."—(*O'Neall, J.*)

Upon evidence that an ancient deed had been legally proved before a justice of the peace and registered—"If there were no other circumstance in this case, I should say that that warranted the judge in sending a deed thirty-five years old, to the jury."—(*Id.*)

Before GANTT, J., at Georgetown, Fall Term, 1839.

Trespass to try title to land. The plaintiffs offered, in

evidence, a deed dated April 1, 1805, purporting to be a conveyance of the land in dispute from William Frierson, sheriff of Georgetown, to Adam Tunno, and which was essential to complete their chain of title. It was in proof that Frierson was sheriff at that time, and left the district soon after; that the signatures of the two subscribing witnesses (whose death appears to be admitted, though the fact does not appear, either in the report of the circuit judge or in his notes of the evidence,) were their genuine handwriting; and that the deed had been proved before a justice of the peace, and was duly recorded in the Register's office. The handwriting of Frierson, the grantor, was not proved, nor was it shown that there had been any possession in the grantee under the deed.

The defendant insisted against the admissibility of the deed in evidence, and moved for a nonsuit; but the Court overruled the objection, and sent the case to the jury, who found for the plaintiffs.

The defendant appealed, and renewed his motion for a nonsuit.

Curia, per O'NEALL, J. To answer properly the question raised by this appeal, it will be well to understand what is the legal effect of proof of the handwriting of subscribing witnesses. In *M'Elvee* v. *Sulton*, (2 Bailey R. 128,) it is correctly said to establish the deed upon the presumption,—1. That if the deed had not been executed as it purports to have been, the witnesses would not have subscribed their names—and, 2. That if the witnesses were alive, they would give all the necessary evidence to establish the fact of execution. These being the legal conclusions from such secondary evidence, introduced as the best which the case is susceptible of when the witnesses are dead; it would seem

to follow, that it is not necessary to prove the grantor's handwriting; for his signature, seal, and delivery, are proved when the handwriting of the witnesses is proved. But it is usual to prove his handwriting, and where it can be done it is safest and best to prove it.

Here, however, the deed is an *ancient* one. Thirty-five years have passed since its execution. Twenty years, in this State, is the time after which, generally, presumption stands in place of proof, for the memory of man is supposed not to go back beyond it; and deeds, if they are thirty years old, with possession under them, or other circumstances accompanying them and showing their authenticity, are admitted in evidence without proof of execution. In *Wagner, et al.*, v. *Aiton*, (Rice R. 100,) a deed thirty-nine years old was admitted in evidence, on proof of the handwriting of one witness, and of the registry of the deed.[1] In that case, the Court remarked that the proof was all which could be given, and enough to establish the existence of the paper more than thirty years before. In *Jackson ex dem. Livingston, et al.*, v. *Burton*, (11 Johns. R. 64,) the subject underwent the review of the Supreme Court of New York, and a deed forty-four years old was admitted in evidence, on proof of the handwriting of one of the subscribing witnesses. Ch. J. Kent said that "the proof of the deed was *prima facie* sufficient," nor was it even contended that it would have been otherwise, if proof had been given of the handwriting of the other subscribing witness.

Among our own decisions, a single case seems to be at variance with the position for which I am contending. (*Sims* v. *De Graffenreid*, 4 M'C. 253.)[2] But that case is very imperfectly reported; nor does that go so far as to decide that, upon evidence of the death of the witnesses, and proof of their handwriting, the deed would not have been proved. The decision there was, that the death and evidence of the handwriting of *one* witness was not sufficient.

Upon a subsequent trial, the death and handwriting of the other witness being proved, as well as the registry of the deed, the plaintiff again obtained a verdict, which was not disturbed.

The case of *Cornneil* v. *Bickley*, (1 M'C. R. 466,) where the grantor's handwriting was proved, and the subscribing witnesses were out of the State, put the objection to the proof of a *recent* deed upon the absence of evidence of the handwriting of the latter. From which it appears, that proof of the grantor's handwriting did not, *per se*, establish the *factum* of execution, and that the handwriting of the witnesses must be proved to establish it. The reason of this is plain; in ordinary cases, the grantor could not prove the execution of his own deed; and, if he is incompetent as a witness, it would seem to follow that proof of his handwriting could only be a circumstance in aid of the proof of execution, and not essential to it.

Indeed, in no case of secondary evidence, is plenary proof to be expected. Such proof as will create a belief of the fact is all that can be required. When subscribing witnesses to a deed or will are dead, or removed, less proof is to be looked for than might be obtained if they were present; and if many years have elapsed since the execution of the paper, the proof becomes, of course, more difficult and less full. In *Stockdale* v. *Young*, (2 M'C. R. 531,) there was a deed from John to Edward Rutledge, witnessed by Keating Lewis Simmons and John Dunlap, Esqrs. The parties and witnesses being dead, the deed, which was twenty-six years old, was admitted, on proof of the grantor's handwriting and of that of one of the subscribing witnesses, that of the other being difficult of proof. That case shows that there is no inflexible rule which compels the Court to require in all cases proof of every matter which may usually be given, and also, that, when secondary evidence is resorted to, which satisfies the mind of a fact, the jury may find it accordingly. So in

Duncan v. *Beard*, (2 N. M'C. 400,)[3] the fact that an ancient will was found in the proper office, and had been admitted to probate, was held to be such a mark of authenticity as would justify the Court in permitting it to go to the jury. And the reason of that decision reaches another circumstance in this case. By an Act of the Legislature,[4] deeds are allowed to be recorded on being proved before a justice of the peace. And an attested copy of a deed thus recorded is, in the event of the loss of the original, evidence without other proof. When a deed is found to have been legally proved and registered, it is as strong a proof of its authenticity as to find a will in the proper office. If there were no other circumstance in this case, I should say that *that* warranted the Judge in sending a deed thirty-five years old to the jury.

Motion dismissed; the whole Court concurring.

Harllee, for the motion; *Lesesne*, contra.

[1] Also possession.
[2] See 11 Rich. 320; post, 272. *An.*
[3] See 2 N. & McC. 55. *An.*
[4] 7 Stat. 247. *An.*
See 2 McM. 498; 1 Rich. 56; 1 Sp. 191. *An.*

JAMES D. LYLES *v.* ROBERT BASS.

The defendant, a free colored man, purchased an unsound slave who had been his wife, at a price greater than her sound value, although well aware of her unsoundness, and warned of it by the owner. It was a binding contract, and the verdict of a jury to the contrary was not sent back.

Before GANTT, J., at Marion, Fall Term, 1839.

Assumpsit, on a sealed note, given for the purchase of a female slave, named Doll. She had been the wife of the defendant, a free man of color, and had been separated from

him by her master, Lyles, who carried her away into North Carolina. The defendant went to North Carolina to purchase her. Lyles told him she was very sick—that she was unsound, and he had better not buy her; but he said it was his own look out, she was his wife. Lyles then told him that, if she died before she left there, he should not pay for her; and the bargain was completed by the defendant giving his notes for five hundred dollars. At the time of purchase, and long before, Doll was obviously very ill—altogether unfit for service, and of no pecuniary value. She afterwards declined constantly till she died. When sound, she had been appraised at one hundred dollars and offered for sale for three hundred dollars. Bass was a man slow of apprehension, and easily imposed upon.

Verdict for the defendant.

The plaintiff appealed from this verdict, as contrary to law and to the evidence.

Curia, per RICHARDSON, J. This case furnishes an instance in which the Court must order a reconsideration of the evidence by the jury. At the time of the purchase, Lyles told Bass that Doll "was unsound; "that she was very sick," and "that he had better not buy her." But Bass replied, "it was his own look out, that she was his wife." Lyles then said, "If Doll died before she left there," (his house in North Carolina,) "Bass should not pay for her." But besides the positive evidence to this effect, Bass knew Doll well. Under such circumstances every man must stand to his own determination, as was observed by the Court in the case of *Williams* v. *Vance*, (Dudley R. 97.) Bass's determination was to give a very high price for a very sickly slave, in order to continue her as his wife. It may have been a bad bargain to Bass. But the office of this Court is to enforce contracts, not to make them, and we cannot deprive Lyles of his good bargain where there appears to have been no concealment or fraud. He may have rigidly

exacted a high price, yet it is a binding contract, when openly and fairly made. And a man who purchases property for his personal gratification, must pay the price agreed on. As Bass said, at the time of the bargain, "it was his own look out—Doll was his wife."

This is the true law of the case, and he must take the consequences of his bargain, as he plainly understood it.

BUTLER and EARLE, JJ., concurred.

Harlee, for the motion; *Bailey*, contra.

See next case. Also 1 Rich. 48. *An.*

ROBERT M. VENNING *v.* THOMAS J. GANTT.

The purchaser of a negro had notice of his having a shortness of breath, which was attributed to a severe fall. It turned out, afterwards, that his lungs must have been dangerously diseased at the time of sale; though there was no appearance of unfairness or concealment. *Held*, that there was not sufficient notice to relieve the vendor for a sound price from his implied warranty.

The sufficiency of notice of unsoundness, where it is equivocal, is a point for the jury to determine.

Before the Honorable RECORDER of the City Court of Charleston, January, 1840.

This was an action of assumpsit on an implied warranty of soundness, to recover the value of a negro named Philander, who was, with some others, sold by the defendant, through Thomas Gadsden, to the plaintiff, on March 9, 1839, and died soon after.

The plaintiff was fully informed that Philander had a shortness of breath, supposed to have been occasioned by a fall from a house not long previous. It was remarked by several witnesses that he looked quite sick on the day of sale, and, by one who had known him before, that he had fallen off very much. But it did not appear that there was then

any swelling of the abdomen, or other symptom, besides those already mentioned, either of dropsy or of diseased lungs. Mr. Gadsden, who effected the sale, said he did not observe or know of any. Immediately after the sale, on a raw, cold day, the negro was exposed to the weather in crossing the river to the plaintiff's premises. The next day his legs and abdomen were obviously swollen, and he could not walk a hundred yards. On the 11th, Dr. Bailey was called in. Being sworn, he described Philander's symptoms: considered his malady a complication of diseased lungs and dropsy; thought it was of long standing and incurable, and could not have originated between that time and the 7th, though exposure to the weather then might have aggravated it. *Dr. Ogier*, sworn, thought that the symptoms described by Dr. Bailey, except the swelling, indicated *pneumonia*, a disease prevalent at that time, and often of sudden occurrence, which might have been occasioned by the fall, or by exposure: but neither this disease nor these causes could account for extensive swelling of the abdomen and legs.

Gadsden sent his clerk to the defendant after the sale, to inquire if he should insert in the bill of sale a warranty of soundness: defendant directed him not to do so. It did not appear whether this was done with the privity of the plaintiff or not; but it was Gadsden's general practice to apply, of his own accord, to the vendor for instructions in this particular.

"I charged the jury," said his Honor, "that a sound price warranted a sound commodity; but that a warranty of soundness could not be implied, when there was a refusal at the time of sale to warrant. Whether *Venning*, by himself or agent, required a warranty from Gantt, which he refused, I submitted to the jury, on the following testimony: Gadsden was the agent of both parties; after the sale, and before the delivery, he sent Spencer, his clerk, to ask Gantt if he should insert a warranty of soundness, and Gantt refused; that

Venning could not be considered as waiving his implied warranty, unless he knew that Gantt refused to warrant. That if they came to the conclusion that the implied warranty was not negatived, then the next question I submitted to them was, did the price warrant the soundness; if so, then I charged them, that it could not be considered a warranty against the fall and its consequences, because plaintiff bought with a full knowledge of that. That if they believed the negro died from the fall, or its effects, the plaintiff was not entitled to recover; but if he died from another disease not connected with the fall, existing at the time of sale, he was entitled to recover."

Verdict for the plaintiff. Defendant appealed,

Because he had expressly refused to warrant the negro; and,

Because the plaintiff had sufficient notice of the unsoundness.

Curia, per RICHARDSON, J. Considerable efforts have been made to bring this case within the established exception to the general rule, that a sound price warrants sound property; by reason of notice to the purchaser. It was submitted with full and clear instruction by the Court, and the verdict verifies these facts: That a sound price was paid for Philander, that there was an implied warranty of soundness, and that Philander died of a disease disconnected with the fall; to which disease the implied warranty extended. Do the facts, then, and the law of the case, warrant the inference that the jury have been mistaken? The notice received that the negro had sustained a fall, to which his short breathing was ascribed, was scarcely a reasonable intimation that such short breathing might arise from some fatal malady, so as to put Venning on his guard. Such notice, coupled with the supposed accidental cause, might rather detract from his suspicion, that it had a more permanent and fatal source in some disease unknown to the seller or purchaser.

This case is very unlike that of *Vance* v. *Williams*, (Dudley R. 97.) There, notice of the danger was given, and the reason assigned for apprehension of the very disease which caused the negro's death. Nor is it like the case of *Lyles* v. *Bass*, (*supra*, p. 85,) decided at this term. Bass bought at a sound price, but, as he expressed it, on his own look out, after explicit notice that she was very sickly. These two cases plainly illustrate the reason of the exceptions to the rule, that a sound price warrants sound property. The exception has place where the purchaser has been fairly put upon his guard, so as to make the consequences that follow his own risk. This being the essential ground of the defence in the case before us, can we infer that the jury were mistaken in concluding that the notice to Venning was not sufficient? Could notice of an affection ascribed to an accidental cause put any but a very suspicious mind on its guard against chronic, constitutional disease? Besides the vendor's total ignorance of Philander having dropsy, or disease of the lungs, renders it the more probable that the plaintiff was not set upon his guard against them. They were unsuspected; and the short breathing of the negro was attributed to the fall.

It may be justly added, too, that the notice to Venning being equivocal, whether it was sufficient to put him on his guard generally, is necessarily a part of the case decided by the jury. And they have, by their verdict, negatived the inference of fair notice to Venning, which was essential to the defence.

Upon the whole case, then, the Court considers it well submitted to the jury, and legally disposed of, by the proper tribunal, under the now well established doctrine of *Timrod* v. *Shoolbred*, (1 Bay R. 324.)

Motion dismissed; EARLE and BUTLER, JJ., concurring.

O'NEALL, J. I dissent, on the ground that, where there is a refusal to warrant, or where a defect is pointed out, or known, there is no implied warranty; and, to entitle the plaintiff to recover, there must have been an express warranty of the negro, or other chattel sold, in all other respects; or a deceit proved.

Bentham and *Hunt*, for the motion; *Yeadon*, contra.

See, *ante*, 85. 1 Rich. 405, 51. 1 Sp. 319. *An.*

WILLIS WIGGINS *v.* JOSEPH VAUGHT.

"Promise to pay as soon as I am in possession of funds to do so, from the estate of B.," is not a promissory note within the statute. (But *otherwise*, it seems, if the promise had been unconditional, though a particular fund was designated.)[1]

Having been declared on as such, exception was properly taken by motion for a nonsuit, after general issue pleaded.

The expense, both of a full trial and of an appeal, having accrued from a nonsuit having been improperly refused below, the Court exercised the discretion of ordering, instead of a nonsuit, a new trial, with leave to the plaintiff to amend.

Before GANTT, J., at Conwayboro', Fall Term, 1839.

This was an action of assumpsit brought on the following instrument:

"Due Willis Wiggins, two hundred and forty-two dollars sixty-four cents, which I promise to pay as soon as I am in possession of funds to do so from the estate of Bellune.

JOS. VAUGHT, *Guardian*,
for JOHN D. and —— BELLUNE.

December 14, 1837."

The declaration contained, besides the usual money counts, a special count, as follows:—"For that whereas, the said defendant, &c., did make his certain note or due bill in writing,

commonly called a promissory note, with his own proper handwriting, &c., by which said note or due bill, the said Joseph Vaught did promise to pay, or cause to be paid unto the said Willis Wiggins, the full and just sum of one hundred and forty-two dollars sixty-four cents, as soon as he was in possession of funds from the estate of Bellune, for value received. And the said time for the payment of the said sum of money mentioned in the said note has elapsed; as the said Joseph Vaught has been in funds of the estate of Bellune, or has had sufficient time and means to possess himself thereof."

The defendant pleaded the general issue, and, upon the trial, moved for a nonsuit on the ground: 1. That the instrument declared on was not a promissory note within the meaning of the statute; but, 2, was a special contract, the consideration of which should have been set out in the declaration and proved upon the trial.

The Court refused the motion, and the defendant being proved to have been in possession of funds of the estate of Bellune, the jury found for the plaintiff.

The defendant appealed, renewing his motion for nonsuit.

Curia, per O'NEALL, J. The only question necessary to be considered is, whether the note declared on is a promissory note. Chitty on Bills, 54, says that there are two principal qualities essential to the validity of a bill or note—first, that it be *payable at all events*, not dependent on any contingency, nor payable out of a particular fund—and secondly, that it be payable for money only.

The note in this case is payable "as soon as I am in possession of funds to do so from the estate of Bellune." If the maker had never received those funds, he never could have been made liable on the note. It was therefore payable on a contingency. It was to be paid, too, out of the funds of the

estate of Bellune. *Hill* v. *Halford, et al.*, (2 Bos. & Pul. 413,) is exactly parallel to the case before us. Halford and another sued Hill, as the maker of a note, thereby promising to pay them one hundred and ninety pounds on the sale or produce, immediately when sold, of the White Hart Inn, St. Alban's, Herts, and the goods, &c., value received. The declaration averred a sale of the Inn and goods, before the commencement of the action. After judgment in K. B. by default, writ of inquiry executed and general damages recovered, Hill brought a writ of error in the Exchequer Chamber, and the Court held that this promise could not be declared on as a note, and therefore reversed the judgment. That case, it will be observed, is identical with this in two particulars; that it was dependant for payment on funds hereafter to be obtained, and that the declaration there, as in this case, averred that such funds had been obtained. So, in the case of *Carlos* v. *Fancourt*, (5 T. R. 482,) it was held that a note whereby Carlos promised to pay Fancourt's wife the sum of *ten pounds out of his money that should arise from his reversion of forty-three pounds when sold*, was held not to be a note within the statute of 3 and 4 Ann, c. 9. That case, like this, was a promise to pay on an uncertain future event and out of a particular fund. Many other cases of a similar kind might be cited, but the authorities are so uniform and clear on the subject, that it would be a waste of time to state them further. The only cases which can be found, where notes payable out of a fund are held to be promissory notes, are where there is an unconditional promise to pay at a certain time, and the fund is designated as the means of payment: then, after the time has elapsed, the promise is absolute and the liability to pay perfect, without any reference to the fund. As in the cases of *McLeod* v. *Snee*, (Str. 762,) and *Burchell, admr.*, v. *Slocock*, (Ld. Ray'd. 1545.)

It was objected on the part of the plaintiff that the defect in this case was apparent on the face of the record, and ought to

have been taken advantage of by demurrer, and could not now be resorted to. But this is a mistake—defects of form are aided by verdict. This, however, is a defect of substance, both in the declaration and in the proof. If the note be not a promissory note within the statute, then it was necessary in the declaration to declare upon it as a common law instrument.[2] In such a case the consideration must be stated and the agreement consequent thereupon; and the condition precedent to the liability must be averred to have happened. All these matters must be proved as laid. In the declaration before us, the note is stated as the promise, and the happening of the contingency or performance of the condition is averred. But nothing is said in the declaration, nor was there any proof given on the trial, about the consideration. The plaintiff was therefore, neither on his allegation nor proof entitled to recover. (Chitty on Bills, 7, 88, 89.) In addition to these authorities, it is only necessary to refer to the cases of *Hill* v. *Halford*, (2 Bos. & Pul. 413,) and *Carlos* v. *Fancourt*, (5 T. R. 482,) by which it will be seen that the objection that an instrument declared on as a promissory note which cannot in law be so regarded, may, even after a judgment by default and writ of inquiry executed and damages recovered, be taken advantage of and the judgment reversed. This shows the objection to be one of substance, which cannot be cured by pleading, and hence the party was entitled to move on the trial for a nonsuit, and is here entitled to renew it. It would have been proper on the trial below that the judge should have granted the motion for a nonsuit; but as he overruled it, and the parties have been put to the expense of a full trial, and of a motion in this Court, and as many precedents as *Jamieson* v. *Lindsay*, (4 McC. 93,) justify us in refusing here to nonsuit the plaintiff, but to order a new trial and give the plaintiff leave to amend, that course will now be pursued.[3] A new trial is ordered, and the plaintiff

has leave to amend his declaration by adding a count as on a common law instrument.

RICHARDSON, EARLE and BUTLER, JJ. concurred.

Munro, for the motion; *Harllee*, contra.

[1] 1 Strob. 44. *An.* [2] 1 Riley's, C. R. 339. *An.* [3] 8 Rich. 446. *An.*

THE STATE ex relatione WILLIAM LUTEN *v.* THE COMMISSIONERS OF ROADS for St. George's Parish.

Where slaves, hired by the month, had been employed the greater part of the year by the same person, in working on the railroad, the hirer was properly held accountable by the commissioners for their road service in the parish in which they were so employed.

Hands working on the railroad, (though by law a public highway,) are not exempt from ordinary road duty.

The road duty of hired slaves is due at the place where they have resided and worked the greater part of the year.

In what instances the hirer of slaves, or the owner, should be made liable for their road service, cannot be indicated by any precise rule, but must depend on circumstances to be judged of by the commissioners.

Before BUTLER, J., at Walterboro', Fall Term, 1839.

Declaration in prohibition; upon which the following verdict was had:

"We find that the plaintiff, having a plantation and house in the lower part of St. George's parish, had hired by the month, and had under his control, eighteen male hands, between the ages of sixteen and fifty, which belonged to, and were hired from, different persons residing in St. James's parish. That for the greater part of the year 1837, the plaintiff, as a contractor on the railroad, had the said hands employed in making embankments on a portion of said railroad, which runs through the upper part of St. George's parish. That there are two Boards of Commissioners for said parish; and that the said hands were at work on the railroad, within the limits of the upper Board. That the Commissioners for the upper Board required the plaintiff to

send said hands to work on the highway in their division. That the plaintiff objected to the liability of said hands working on roads in their jurisdiction. Nevertheless, he appeared before the Board, and made a return, according to an entry in the books of the Board, of eighteen hands; but verbally reserving to himself all his legal rights; and we find that he ought not to be deprived of any of his legal rights by said return.

"If, according to the above facts, the plaintiff ought to recover, we find for him: if not, we find for defendants."

On this finding the relator moved for a writ of prohibition, which was refused.

The following extract from his Honor's opinion below, is given here because its reasoning is adopted by the Court.

"The main ground relied on, in argument, was, that the relator being a contractor on the railroad, and having his hands employed on the same, as one of the public highways of the State, was exempt from liability to work on the common highway. This ground cannot be sustained. The railroad has been declared to be a public highway, upon which all the citizens of the country have a right to travel, and transport their goods. But, by a charter from the State, it is exclusively under the control of a private company; that company deriving all the income arising from it, is exclusively under an obligation to keep it in repair. They cannot compel any citizen to work on it; but must employ their own means of working on, and keeping it in a proper state, for the safe transportation of passengers and goods. Any one who becomes a contractor on it, does so voluntarily, and for his own advantage. He has chosen to transfer his labor from his own plantation, or other private employment, to employ it for others. He is compensated for his labor by contract with a particular set of individuals, and cannot be thereby exempt from the obligations of other citizens, to work on the highway of the State, for which they receive no

stipulated compensation. If the relator had been the owner of the negroes, he certainly would have been liable for their default, in not working on the roads within the jurisdiction of the defendants. For the hands had been employed for the greater part of the year on that portion of the railroad that is within the jurisdiction of the Commissioners of St. George's. The serious difficulty in the case arises from the fact, that the relator is not the owner of the hands, but had hired them by the month from their owners, residing in St. James."

The relator appealed, and renewed his motion for the writ.

Curia, per BUTLER, J. The circuit decision in this case must be affirmed. The first ground for the motion, as noticed in the opinion below, cannot be sustained, for the obvious reasons therein stated. The other requires, perhaps, some comment. It was this, that, although the hands of the relator had been employed for the greater part of the year within the jurisdiction of the defendants, they did not belong to him but for a limited time, and were not liable to be returned by him, so as to subject him to liability for their not working on the road.

By the A. A. 1825, sec. 9,[1] (p. 31,) all the male inhabitants of this State from sixteen to fifty years of age, are declared liable to work on the public roads, &c., and the Commissioners are empowered to direct on what roads they shall be employed, provided that such roads be within ten miles of the residence of the person, or of the place where the slaves are employed the greater part of the year. Section 11 authorizes each Board of Commissioners to declare what inhabitants are liable to work on any road or part of a road in their respective parishes or districts, or divisions, subject to the restrictions of time and place previously mentioned; and each Commissioner, in his respective division, is required to call on all the

inhabitants within the same, to make a return, (on oath, if required,) of all the male slaves belonging to them, or under their management and direction, from sixteen to fifty, and who reside in such parish or district for the *most of the year.* The Commissioners, by the return made to them, must decide on the liability of the hands to perform service on the roads, according to their time of residence. As soon as it is ascertained that slaves have resided and worked at any particular place for the greater part of the year, the Commissioners have a right to command their labor. They cannot command the slaves themselves, but they may proceed against those who have an interest in, and a control over them. Against whom they are to proceed, must be, in the first instance, a question addressed to their judgment and discretion, for they have a right to say what inhabitants and slaves shall work on any particular road. They might say some of one man's hands should work on one road and some on another, and their owner on a third.

In what instances the hirer of hands, having a limited interest in them, or the owner, should be made liable for their service, cannot be indicated by any precise rule, but must depend on circumstances, to be judged of by the Commissioners in the exercise of a sound discretion. One who has hired a hand for a day, or a week, might fairly claim exemption, while a hirer for three years, or one year, would not be entitled to it. In the case before the Court, it appears that the hands in the possession of the relator had been employed by him for his benefit, for the greater part of the year, within the limits of defendant's jurisdiction. For this time he was their master and owner, and was properly amenable to the Commissioners for their road duty. The Commissioners clearly had jurisdiction of the relator and his hands, and we do not perceive that they have shown such a disposition to abuse it as to require the interference of this Court to restrain the exercise of their authority.

Upon both grounds, therefore, the relator's motion is refused. The whole Court concurred.

Edwards, for the motion. *Rhett*, contra.

[1] 9 Stat. 559. *An.* See 1 Rich. 348. *An.*

JAMES MOORHEAD *v.* RACHEL BARRETT.

Avowry by an administratrix for rent in arrear, set forth the demise under which the tenant held, made in her own name after her intestate's death. *Held*, that no further title need be shown, and a verdict for the avowant was right.

A landlord is not bound to set out in his avowry for rent in arrear any further title than the lease under which his tenant entered and held the premises.

The Statute 11 Geo. II. c. 19, though not expressly made of force in this State, has been adopted in practice.

Before EARLE, J., at Charleston, May Term, 1839.

This was an action of replevin. Defendant avowed for rent in arrear. She was the administratrix of her deceased husband, and the demise was after his death and in her name. The plaintiff in replevin, having been called on by the avowant's agent before the distress, acknowledged the tenancy and the sum due as rent in arrear, and promised payment. The avowry did not describe the defendant as administratrix, nor set out the title; and on these grounds exception was taken, but overruled by the Court. Verdict for the avowant.

The plaintiff appealed on the same exceptions, urging, in support of the latter, that the Stat. 11 Geo. II., c. 19, dispensing with the necessity of stating the title of the avowant in the avowry, is not of force here, (1 M'C. R. 299,) and that the common law rule is the law of this State. (5 Cow. R. 501; 1 Johns. R. 379.)

Curia, per BUTLER, J. The decision of a single point in this case will dispose of all the questions involved in the grounds of appeal, viz.: Is a landlord, who has distrained for rent, bound to set out in his avowry anything more than the lease under which the tenant entered and held the premises?

The rule of law is unquestionable, that a tenant cannot dispute his landlord's title: he is estopped, by his own deed, from denying anything contained in it; that constitutes the law of the contract. Hence, in an action to try titles, by a landlord against a tenant holding over, the plaintiff is not required to go farther back into his title than the lease disclosing the relation of the parties, to entitle him to recover the land and damages for its use. If the land itself may be thus recovered, why may not the rent, which is but an issue from the land.

The avowry, in this case, sets out the lease under which defendant entered, and by which he bound himself to pay rent to defendant, not as the representative of any one, but absolutely, as *Rachel Barrett*. He must abide the terms of his deed, and cannot dispute the character of the avowant as therein recognized. This being the case, the plaintiff has no right to require the defendant to set out *her* title to the premises, but is controlled by the title under which *he* holds them. There may, possibly, be cases where the plaintiff in replevin may require the avowant to set out title to land, as where the plaintiff is a stranger to the avowant; but, as between landlord and tenant, it never can be necessary.

By Stat. 11 Geo. II., c. 19, sec. 22, (2 Stat. So. Ca. 579,) it is expressly enacted that an avowant in replevin is not bound to state anything more in his avowry than the lease or demise under which the tenant held. This statute has not, it would seem, been expressly made of force in this State.[1] Its provisions, however, have been so uniformly observed in practice, that it may be said to form a part of the law of the land. Indeed, it seems to me to be but declaratory of the general principles regulating the relation of landlord and tenant Motion dismissed.

GANTT, RICHARDSON, and EARLE, JJ., concurring.

Magrath, for the motion; *Horlbeck*, contra.

[1] See 1 Sp. 289; 2 Rich. 402; 2 McC. 165; Post 251. *An.*

THOMAS NAPIER & Co. *v.* J. J. GIDIERE, Executor.[1]

A plaintiff, who had gone into both Courts upon the same demand, being put to his election, chose to proceed in Equity. Motion by his attorney, that his case at law be continued, was refused; he had to take a *nonsuit* and pay costs.

Quære as to costs, if he had proceeded in the proper form of a *retraxit;* for which purpose he must have appeared in person, not by attorney. But a *retraxit* is a renunciation of the whole cause of action, and it is doubtful whether the plaintiff could afterwards have proceeded even in Equity.

Before EVANS, J., at Charleston, January Term, 1840.

In this case, an action had been brought in the Court of Common Pleas, on a judgment of a foreign State. Afterwards a bill was filed in equity to discover assets, by calling on the defendant to account as executor. Upon the prayer of the defendant, the plaintiff was put to his election, and chose to proceed in equity. When his case was called for trial in the court of law, he moved, by his attorney, "that the case stand continued until final decree in the court of equity;" intending thereby to withdraw it from the docket without paying costs. But his Honor refused the motion, and required him either to proceed with his case, or take a nonsuit.

From this order of the Court the plaintiff appealed.

Curia, per EARLE, J. A party plaintiff, is not allowed to prosecute two actions at the same time against one defendant for the same cause. And, should he bring a second action without discontinuing the first, the defendant may plead *auter action pendent*, and the plaintiff will have the costs to pay. For the same reason that he shall not be allowed to do this at law, he will not be permitted to maintain a suit in equity and a suit at law, at one and the same time, for the same cause of action. When the plaintiffs in this case, after suing the defendant at law, filed their bill in equity to enforce the same demand, that Court, in conformity with the settled rule, required them to make their election to proceed either in one

court or in the other, because it would not entertain their bill there, if they persisted in their suit at law. The plaintiffs, therefore, were obliged to let fall one suit or the other. Having made their election to proceed in equity, they were obliged to let fall their action at law.

But I understand the plaintiffs' counsel to insist that they had a right to do this in their own way, and without costs. I am not aware of any mode in which this can be done; nor have I met with authority for it in any precedent in any book of practice. There are three modes of voluntarily letting fall an action at law: 1. By a *discontinuance*, which is allowed only on payment of costs. 2. By entering a *nol. pros.* on the record, which is also allowed only on payment of costs, when it extends to the whole cause of action. 3. By a *retraxit*, the benefit of which is claimed, I understand, by the plaintiff here. This is done by the plaintiff, when the cause is called for trial, coming in person into the court where his action is brought, and saying he will not proceed in it. It is so called from the form of the entry, which will be found in 2 Sellon's Practice, 338. "*Et prædict. quærens in propria persona sua venit et dicit quod ipse placitum suum præd. versus præd. defendent. ulterius prosequi non vult, sed abinde omino se retraxit.*" But it is also said that a *retraxit* must always be in person; if it is by attorney it is in error. (8 Rep. 53; 3 Salk. 245.) It will be perceived that the course pursued by the plaintiffs' attorney below was anything but a *retraxit*, as the plaintiffs did not appear at all, and no entry was made on the record; besides, a *retraxit* is a very different thing from what he seems to have supposed. Instead of being a proceeding to withdraw the record from the Court, and to transfer it to equity, it is a proceeding by which the plaintiff withdraws himself from the action altogether. It is an open, voluntary, and final renunciation of his suitin court, by which he for ever loses his action. (2 Sell. Pr. 338; 3 Comm. 296.) If the plaintiffs here had, in proper person, entered a

formal *retraxit*, it may well be doubted whether they could have proceeded in Equity. As to the payment of costs on a *retraxit*, we will consider that when a case occurs. As the plaintiffs would not let fall their action in any of these forms, and yet refused to go on to trial, having elected to proceed in equity, no alternative was left but to give the defendant this judgment of *non pros.*

The Court is of opinion that it was properly ordered, and the motion to set it aside is refused.

Motion dismissed; the whole Court concurring.

Hunt and *Smith*, for the motion.

[1] S. C. in Equity; Sp. Eq. 215 in Errors; 3 Strob. Eq 192; 7 Rich. Eq. 254. At law, *Gray, master*, v. *Gidiere, et al.*; 4 Strob. 438; 5 Rich. 386; 7 Rich. 168. *An.*

THE STATE *v.* ANDREW PRIESTER.

One count in an indictment charged the *buying of corn* from a slave, another the *selling of liquor*. The defendant, who was not a vendor of spirits by profession, had traded the liquor for the corn. A general verdict of guilty was held good; for the two counts charged the same act and the same offence.

It seems that it would have been otherwise, had the defendant been a distiller, vendor, or retailer by profession; for then, the offence in the *second* count would have been that created by A. A. 1834, while the *first* charged a violation of the A. A. 1817.

The words "distiller, vendor, or retailer," in the A. A. 1834, refer only to distillers, &c., by profession or habitual practice.

Two distinct offences, with different penalties, may be charged in the same indictment; but care must be taken to have the verdict framed so as to secure the several counts.

Before EARLE, J., at Coosawhatchie, Spring Term, 1839.

The defendant was convicted upon an indictment which charged that he "did buy and purchase of and from a certain slave of Frederick Mole, named Frank, one bushel of Indian corn, of the value of one dollar, the said slave then and there

not having a permit to sell, from or under the hand of the said Frederick Mole, &c." And, in a second count, that he "did deal, trade and traffic" with the same slave, "by selling said slave Frank certain spirituous liquor, to wit, five quarts of rum, the said slave then and there not having a permit so to deal, trade or traffic, &c." Verdict, guilty.

The defendant appealed and moved the Court in arrest of judgment, on the ground, that two distinct offences, viz.: *buying corn* and *selling spirits* to a slave, were joined in one indictment. (2 M'C. R. 257.)

Curia, per EARLE, J. The defendant is indicted under the A. A. 1817, (p. 25), for unlawfully trading with a slave.[1] There are two counts in the indictment; one for buying from the slave a bushel of corn, the other, for selling him five quarts of rum. It was one transaction, and tho solicitor has only varied the statement so as to adapt the charge to the proof he was likely to make. He might prove that Frank had obtained the rum without being able to show that he had exchanged the corn for it; or else, that he did exchange a bushel of corn for the rum; so that only one offence was committed, and that was under the Act of 1817.

It is supposed that the second count is framed under section 3, of the A. A. 1834, (p. 12.)[2] That Act relates only to cases where a distiller, vendor, or retailer of spirituous liquors, sells, exchanges, gives, or otherwise delivers liquor to a slave. Now, it is true, in common parlance, that any one who sells an article is a vendor; but the Act was obviously intended only to embrace open and habitual vendors and licensed retailers; and the words, vendors and retailers, are used to designate that class of persons. Why the Legislature, in the case of a sale, or exchange of liquor to or with a slave, by the class of persons which would come within the provisions of the Act of 1817, against the unlawful dealing or trading with a slave, should have reduced the maximum of imprison-

ment from twelve to six months, and of the fine from $1000, to $100, it would require more sagacity than I possess to discover. It would certainly be as criminal and as mischievous in Andrew Priester, being a distiller, or licensed retailer, to give a slave a jug of rum for a bushel of corn, as it would be in a worthy citizen, pursuing neither of these respectable occupations, to give a slave twelve and a-half cents for a dozen of eggs, or a pair of shoes for a dozen chickens. Yet the distiller, or retailer, as a proof, I suppose, of the high estimation in which his useful calling is held, can be made to suffer only one half of the imprisonment and to pay one-tenth of the fine which the rigor of the Act of 1817 imposes on his less respectable neighbor. Andrew Priester, however, has not been indicted as a vendor, or retailer, and, to his misfortune, there was no proof of his being either within the meaning of the Act of 1834, as we construe its terms. There is, therefore, no misjoinder, as has been supposed, of inconsistent charges, nor indeed of two distinct offences with different penalties. Even that, however, is allowable according to the strictest rules of criminal pleading; but care must be taken to have the verdict framed so as to secure the several counts.[3]

Motion dismissed; the whole Court concurring.

Hutson and *Colcock & Hutson* for the motion; *Edwards*, Solicitor, contra.

[1] 7 Stat. 454. *An.*
[2] 7 Stat. 469, § 3. *An.*
[3] 1 McM. 190; 7 Rich. 485; 3 Hill. 1, 2 N. & McC. 561. *An.*
See 3 Hill, 191; 11 Rich. 450. *An.*

THE STATE *ex relatione* W. MATTHEWS *v.* E. V. TOOMER, *et al.*, (a Court of Magistrates and Freeholders of Christ Church Parish).

A slave having been convicted by a Court of Magistrates, &c., of Christ Church, of the murder of a slave, who received the mortal injury in that parish, but died in another, in the *same district;* execution of the sentence was arrested by prohibition.

The A. A. 1793, (1 F. 339; 5 Stat. So. Ca. 231,) providing, in case of mortal injury inflicted in one county or district, and death ensuing in another, that the trial shall be had where the death occurred, extends to the case of homicide of one slave by another.

In the case of offences cognizable by a parish magistracy, the principle of the Act is applicable to the separate parish jurisdictions, though in the same district.

The A. A. 1832, sec. 2, (p. 60,) concerning the trial of slaves, seems to be only of special application to the city of Charleston.

Before EVANS, J., at Charleston, January, 1840.

Suggestion for prohibition. *Major*, a slave of the relator, was convicted by a Court of Magistrates and Freeholders, in Christ Church parish, of the murder of *Mary*, the slave of Robert Howard, and was sentenced to be hung. The verdict was found by one magistrate and three freeholders, a bare majority; the other magistrate and two freeholders finding *manslaughter*. It appeared that the deceased had received the injuries in Christ Church parish, and was afterwards removed to Charleston, (St. Philip and St. Michael's parish,) where she died. These parishes are both in Charleston district.

A writ of prohibition was ordered, to prevent the execution of the sentence. The grounds for the motion, as considered by the Court, were, 1. That sentence of death was passed without a unanimous verdict of the freeholders. 2. That the prisoner was not tried in the parish where the deceased had died.

"The A. A. 1832, sec. 2,[1] (p. 60,) requires that the freeholders shall be unanimous in capital cases; but on examining

the series of Acts[2] passed for organizing the peculiar magistracy of St. Philip's and St. Michael's, I am satisfied that they form a system which does not extend to any other part of the State. At first, I was inclined to give to this enactment a general operation, and I regret that I am constrained to come to a different conclusion. The words "principal magistrate" can have no meaning, unless in reference to the distinction of judicial and ministerial magistrates, which is unknown, except in the acts which relate to these parishes.

"In the instance of a mortal wound given in one county, or district, and death ensuing in another, it was formerly somewhat doubtful where the trial should be had. But the A. A. 1793, (1 Faust, 293; 5 Stat. So. Ca. 241,) requires it to be in the county or district where the deceased died. Under the provisions of that Act, if the blow had been given in Georgetown and the deceased had died in Charleston, there is no doubt that the trial should have been in the latter. The magistracy of the parishes is local; and I should suppose that all offences by slaves, in any particular parish, would be within the exclusive jurisdiction of the magistrates and freeholders of that parish. The parishes stand towards each other, as to jurisdiction, in the same relation that the Circuit Court districts do. They are not mentioned in the Act of 1793, but I can see no reason why its provision should not be extended to them in cases of conflict of jurisdiction, which it was intended to settle and declare. On this ground I am of opinion this prohibition should be granted."

The defendants appealed, and moved to set aside the writ.

Curia, per EARLE, J. The Act of 1793, was passed for the purpose of settling a doubtful question on an important subject. The terms are very general, and, perhaps, were not intended, at the time, to embrace the homicide of one slave by another. At least, considering the policy of the country, then, in regard to slaves, it may well be doubted whether

such cases were contemplated at the time the Act was passed. Yet the terms are so broad and comprehensive, that they do, literally, embrace all cases of homicide. But the tendency of our modern legislation has been such as to promote a more favorable regard for the life of the slave, and we think the presiding Judge below was right in ordering the prohibition. The last clause of the Act, on a fair and liberal construction, applies as well to the trial of slaves as of white persons; "and the persons guilty of such striking or wounding, shall be tried by and before the same Court as if the deceased had suffered the injury in the same county or district in which he died." Inasmuch, therefore, as the slave in question died in the parish of St. Philip and St. Michael's, and the jurisdiction of justices and freeholders is local, there would have been the same difficulty as existed at common law, in regard to the proper place of trial. All the analogies of the law are in favor of the construction given by the Court below; and the claim of the relator here is strengthened by the consideration that, if the accused were tried in St. Philip and St. Michael's, the verdict must have been unanimous. The judgment of the Circuit Court is affirmed,

The whole Court concurred.

Elliott, for the appellant. *Elfe*, contra.

[1] 6 Stat. 458. *An.*
[2] 6 Stat. 418, 328, 486. *An.*
See 2 Strob. 286. *An.*

THE STATE *ex relatione* J. JENKINS *v.* COMMISSIONERS OF ROADS OF St. Bartholomew's Parish.

Persons required by law to work on *Watt's Cut*, (Edisto Island,) are not exempt from ordinary road duty.

The Road Act of 1825, (A. A. p. 29,) repeals all previously existing exemptions.

The commissioners of roads have power to impose and collect fines of twenty dollars, but no more.

The Commissioners are authorized (A. A. 1825, sec. 12,) to assess, in certain cases, to a larger amount, but no mode of *collecting* is prescribed.

Before EARLE, J., at Colleton, Spring Term, 1839.

The relator moved for a prohibition to restrain the Commissioners from collecting a fine of thirty-two dollars, imposed upon him for not making a return of his male slaves. The grounds taken in his suggestion were, 1. That the Commissioners had not jurisdiction to impose a fine exceeding twenty dollars; 2. That, by several ancient Acts[1] of the Legislature, his hands were required to work on Watt's Cut, and exempted from working on any other highway. (A. A. 1738, 1851, 1854, P. L. 156, 224, 237.)

The Court overruled the relator's second ground, but sustained his exception to the jurisdiction of the Commissioners, and granted the writ of prohibition. From this decision both parties appealed.

Curia, per O'NEALL, J., held that the exemption claimed by the relator was not authorized by the terms of the Acts referred to, and, at all events, that any such exemption was done away, as well by the general enactment, as by the repealing clause of the Road Act of 1825, (p. 29.)[2] On the question of jurisdiction, the Court said:

It is equally clear, in the opinion of the Court, that the Commissioners have no authority to issue an execution for any fine or penalty exceeding twenty dollars. By the A. A. 1825, each Board of Commissioners was constituted a Court,

for the trial of persons charged with any default, for which fine or penalty was imposed by that Act, not exceeding twenty dollars: and their power to award execution was expressly limited to the same amount. By A. A. 1826, sec. 27, (p. 31,)[3] the section of the Act of 1825 just referred to, was repealed, but the same authority to hear and determine in cases of default, when the fine, penalty, or forfeiture does not exceed twenty dollars, was conferred on three Commissioners, who were likewise empowered to issue execution therefor. Their jurisdiction is expressly limited to twenty dollars, and they cannot impose any larger sum. In what manner the Commissioners shall proceed to enforce the road laws when the fines and penalties shall exceed twenty dollars, we are not called upon to decide. The Legislature has not prescribed any mode of proceeding; and whether the Commissioners shall prosecute by indictment, or bring their action of debt, is left to themselves to determine. And this is rendered the more remarkably by Section 12 of the Act of 1825,[4] which provides that, if any inhabitant shall refuse or neglect to make a return to the Commissioners, of the number of his male slaves, liable to work on the roads, when called on to do so, the Commissioners shall be authorized to make an assessment on such defaulter, of four dollars for each slave so withheld; and they may do this from the best information they may be able to obtain. Such assessment may amount in some instances to a hundred, or several hundred dollars. Yet their decision seems intended to be final and conclusive, for no appeal is allowed. And I suppose they were left without the power to enforce their decision, unless by bringing their action, in order to enable the defaulter to submit his case to a jury—on the trial of which, I apprehend, the assessment made by the Commissioners would not be gainsaid or controverted. It is a strange anomaly, only pointed out, as in the case of Priester, (*supra*, p. 103,) to enable those whose province it is to supply a corrective.

The Commissioners having made their assessment, had no power to proceed farther; and, in issuing execution for thirty-two dollars, we are constrained to hold with the judge below, that they exceeded their jurisdiction, and that the prohibition was properly awarded, restraining the collection of more than twenty dollars.

The whole Court concurred.

Carn, for the relator; *Clarke*, contra.

[1] 1721, 9 Stat. 54, § 17; 1738, P. L. 156, omitted in Stat. at Large; 1741, 9 Stat. 129, § 9; 1751, 9 Stat. 162, §§ 1, 2; 1754, P. L. 237, omitted in Stat. at Large; 1788, 9 Stat. 309, §§ 6, 7; 1795, 9 Stat. 368; 1807, 9 Stat. 426. *An.*

[2] 9 Stat. 560, § 10, 566, § 31. *Ante*, 95. *An.*

[3] 9 Stat. 570. *An.*

[4] 9 Stat. 560. *An.*

See Act of 1841; 11 Stat. 160; 5 Rich. 279. *An.*

As to new Town Cut, 2 Sp. 402; 3 Strob. 380. *An.*

WILLIAM M. MURRAY *v.* DANIEL MOORER, Sheriff of Colleton District.

SEABROOK, Administrator of Murray, *v.* THE SAME.

A fine of sixty dollars having been paid to the Sheriff, upon presentation (without levy) of an execution issuing from a Board of Commissioners of Roads, the Sheriff, who had the money still in his hands, was liable to an action of *indebitatus assumpsit* for the excess over twenty dollars, (the limit of the Commissioner's jurisdiction. *See Supra*, p. 109.)

And, it seems, it would not have been otherwise, it the Sheriff had paid over the money.

Payment to the Sheriff, upon service (without actual levy) of an execution void for defect of jurisdiction, is not a voluntary payment.

Before BUTLER, J., at Waterborough, November, 1839.

"These were actions of *indebitatus assumpsit*, for sixty dollars each, brought in *sum. pro.* jurisdiction, to recover from the defendant money paid to him under the following circumstances. The plaintiffs own plantations and negroes in the parish of St. Bartholomew's; they reside themselves, in St. John's, Colleton. The Commissioners of Roads of the

former parish required the plaintiffs to make a return of their negroes liable to road duty; failing to make such return, they were required to appear and show cause why they should not be fined according to law; and failing to appear, the plaintiffs were fined sixty dollars, for the default of fifteen hands each. For the purpose of collecting the money thus assessed, executions were lodged in the defendant's office, December 18, 1837, signed by the president of the board, and witnessed by the secretary. The plaintiffs paid the money without a levy, upon the executions being presented by the Sheriff, but wrote on them that they would sue for, and recover the money back, in the Court of Common Pleas.

"My opinion was, that the Commissioners of Roads had exceeded their jurisdiction, in issuing executions beyond twenty dollars, and that they might have been restrained from the enforcement of them by a writ of prohibition; but that having paid the money, the plaintiffs could not have this action to recover it back. The law having prescribed the mode of redress they should have pursued it. In the first instance, they should have resisted the liability to be fined, before the Commissioners; and if they had appeared, the fines would not, perhaps, have been imposed. Or if they did not choose to appear before a tribunal without jurisdiction, they should have restrained it by a prohibition. They thought proper to forbear using these preventive means which the law allowed, and to pay the money voluntarily, which I think was justly due by them. If all the money paid on judgments of limited jurisdictions, such as courts martial, justices of the peace, &c., and which might have been resisted at the time, for the want of legal authority to grant them, were recoverble, what mischief and litigation might it not lead to? The defendants were not compelled, in these cases, to pay the money: they did it voluntarily, for they could have resisted the payment. If the executions conferred on the sheriff no valid authority to collect them, they could have restrained the

sheriff himself, by giving him notice that they would apply for a writ of prohibition. As it is, they have subjected parties to costs, trouble and expense, who would not have incurred them if the proper measures had been taken by the plaintiffs."

The plaintiffs moved the Court of Appeals to set aside the nonsuit.

Curia, per EARLE, J. In *the State ex rel. Jenkins* v. *Commissioners of Roads*, (*supra*, p. 109,) it was held, on the construction of the Act of 1836, that the Commissioners have no jurisdiction to impose a fine or issue an execution above twenty dollars. The question now presented is, can a person having paid money to the sheriff, on an execution issued by the Commissioners for sixty dollars, recover it back by suit at law. The difficulty which frequently arises, when money is received under void authority by an agent who has paid it over to his principal, does not arise here; for the sheriff has the money in his hands. Nor, in any case, I apprehend, would such a defence avail him, where he had collected money on a void process which he was not bound to obey. There can be no doubt that, in executing such process, the sheriff was a trespasser. It is equally indubitable that the parties against whom it had been issued might, by prohibition, have prevented it from being enforced; and hence it is contended, and was held by his Honor in the Court below, that the payment of the money is to be regarded as a voluntary payment, which will not support an action. There is great force in the argument;[1] especially when it is considered that the money was really due, and might have been collected in a different form of proceeding; but our opinion is against it, both on principle and authority. If the money had been raised by a sale of goods under the execution, there can be no doubt that the party might have maintained trespass, as the execution was, in law, a nullity; or he might have waived the trespass and have brought his action for money had and received: (*Linden* v. *Hooper*, Cowp. 419.) And we perceive no difference

in principle between such case and that where the party has paid on the demand of the sheriff, with an execution in his hand which he has threatened to enforce, or might reasonably have been expected to enforce. Cases are numerous of money recovered back, when paid on judgments that are afterwards reversed, or on summary convictions that are afterwards quashed. Such was *Feltham* v. *Terry*, cited by Lord Mansfield in *Linden* v. *Hooper*. And there seems to be the same propriety in allowing money to be recovered back when paid upon a judgment not merely erroneous, but absolutely null and void for want of jurisdiction. In 1 Lord Raym. 742, the case was this: Sir Richard Newdigale had a donative, which he gave to the defendant Davy; afterwards he removed Davy and put in I. S. Davy cited Sir R. N. before the High Commissioners in the time of James II., who sentenced him to restore Davy, and to pay him all the arrears that had been received, which were paid accordingly. After the revolution, Sir R. N. brought *indebitatus assumpsit* against Davy for this money, as received to his use. And it was held that the action did well lie, the money being paid in pursuance of a void authority. In *Snowden* v. *Davis*, (1 Taunt. 358,) a bailiff, under color of a distringas to the sheriff of Berks and a warrant from him, demanded and collected from the plaintiff several sums of money, some of which he had authority to collect, and some he had not. The plaintiff was allowed to recover back so much as the bailiff had no authority to distrain for; although, in fact, he had paid over the whole to the sheriff, and he to the Exchequer. It is true the plaintiffs here did not appear before the Commissioners when summoned to answer for the default—and, after the execution issued, they might have restrained the sheriff by prohibition. But whilst they were in pursuit of a judge to grant the writ, the sheriff might have sold their goods; and they are not to suffer from having acted under the belief that the Commissioners knew the extent of their jurisdiction, and

would not issue an execution for an amount beyond it. They may reasonably have supposed, as their default was such as to incur a penalty above that amount, that the Commissioners would resort to an action to collect their assessment. It is said in *Levy* v. *Roberts*, (1 M'C. R. 395,) that a defendant, paying money to the sheriff on an execution, cannot be considered as paying it voluntarily; and so, we think, are all the authorities.

As the Commissioners, however, had authority to issue an execution for twenty dollars, and as this action is to recover back what it is alleged they had no authority to collect, we think the plaintiff should recover only the excess. The nonsuit ordered by the Court below is set aside.

The whole Court concurred.

Carn, for the motion; *Clarke*, contra.

[1] 2 McM. 398; 1 McM. 310. *An.*

WILLIAM W. WILLIAMS *v.* WILLIAM B. OLIVER.

In an action for the purchase money of a lot purchased after the railroad had been constructed through it, a previous agreement in writing, not under seal, by the vendor, to convey to the Company a space through of fifty feet, if necessary, and the power to clear a hundred feet on each side, was not allowed to be set up in discount.

Such an agreement was not a covenant for the conveyance of the fee; but only of an easement, or right of way.

In discount to an action for the purchase money of land, the defendant must make out a valid, subsisting, outstanding, paramount title in another. An agreement to convey a part of the land (or, it seems, even a formal conveyance, if not duly recorded,) will not do.

An incumbrance of which the purchaser had notice could not be discounted against the purchase money.

Before EARLE, J., at Barnwell, Spring Term, 1839.

Assumpsit on two notes of hand drawn by the defendant, one for two thousand dollars, and the other for five hundred

dollars payable to G. Perdue, or bearer, and transferred to the plaintiff.

The consideration was certain real estate in Aiken, purchased by defendant from Perdue, and known to the plaintiff, who had sold the premises to Perdue, and took these notes of the defendant in payment of Perdue's debt to himself. The defence was an agreement, made by the plaintiff himself, before the sale of the premises to Perdue, with the South Carolina Railroad Company, securing to the said Company certain privileges; with a covenant on his part to convey to them a small portion of the premises on a contingency which, it was said, had happened. It was contended, that this agreement and covenant constituted an incumbrance, a subsisting, outstanding, paramount title, which entitled the defendant to an abatement from the price agreed to be given; part of which has been paid, this action being for the balance.

The jury found the following special verdict:

"We find that the notes sued on, were given to G. H. Perdue, in part payment for a house and lot in Aiken, conveyed August 6, 1834, which had been formerly sold and conveyed by the plaintiff to Perdue; that the notes were transferred to the plaintiff in payment of Perdue's debt, the plaintiff being present when they were drawn, and knowing the consideration for which they were given: we find that the plaintiff, on March 12, 1830, before the date of his conveyance to Perdue, of the premises, or any sale or conveyance of any part thereof, under or by virtue of which the defendant derives title, made an agreement in writing, with the Railroad Company, not under seal, that if they would carry their Railroad through or contiguous to his land, in consideration of its being so carried or placed, and without any other compensation, he would convey to the said Company and their successors a space through (his land) of fifty feet in width, if so much be deemed necessary by the Company, and the power to clear and keep clear one hundred feet on each side of the road, and granting to the

Company the power of entering upon and using, without molestation, said land for the above purposes, as they may deem expedient; and for the full and faithful performance of such agreement, he bound himself, his executors, administrators and assigns.

"We find that fifty feet thus described, would include ten feet of the premises conveyed by plaintiff to Perdue, and then to defendant, along the entire front of the lot; and that one hundred feet would include part of the house erected on the lot, and used as a hotel; the entire value of the premises being estimated at about eight thousand dollars, the Company having in fact made their road through the plaintiff's land at that place. We further find, that the house has been built since the date of the agreement of the plaintiff with the Railroad Company; and that the defendant has been, and is now, in the quiet enjoyment of the entire premises without molestation or disturbance.

"If the Court shall be of opinion that the agreement of the plaintiff with the Company, of March, 1830, creates a subsisting incumbrance or outstanding paramount title, and that the defendant may avail himself of it in this action, or claim an abatement of price on his notice of discount, then we find for the defendant. If the Court shall be of a different opinion, then we find for the plaintiff the sum of three thousand six hundred and sixty-four dollars and fifty cents."

After argument the Court was of opinion, that the agreement or covenant of the plaintiff with the Railroad Company, did not constitute, under the circumstances, such an incumbrance, or outstanding paramount title, as would entitle the defendant to an abatement, and ordered the postea to be delivered to the plaintiff.

The defendant moved the Court of Appeals to set aside this order, and for leave to enter judgment for the defendant.

Curia, per EARLE, J. To entitle the defendant to an

abatement from the amount of his note, he should make out a valid, subsisting, outstanding, paramount title to another.[1] It requires very little consideration to perceive, and very little argument to demonstrate, that the agreement of the plaintiff, with the Railroad Company, forms no such outstanding title. In the first place, it was no conveyance transferring title by which any interest vested in the Company; but only an executory agreement to convey; and, as it has not been executed by deed, the conveyance of the plaintiff to Perdue, and of Perdue to the defendant, vests the absolute unincumbered fee in the defendant. Had the agreement been a deed of conveyance formally executed in 1830, but not recorded, the subsequent conveyance to Perdue and to the defendant without notice, would be valid. If the defendant purchased *with* knowledge of the agreement, he cannot be allowed to set it up as a defence in this action, whatever effect it may have, but must be left to rely on the warranty contained in his deed.

The terms of the instrument, however, do not seem to import a covenant for the conveyance of the fee, nor indeed, of any interest in the soil. So far as regards the fifty feet in width, if so much be deemed necessary, it seems only intended to secure the Company a right of way, a space upon which to build the road, and for the purpose of the road. It seems only to have been an easement; and as the road was in the act of being constructed there at the time of the defendant's purchase and the conveyance from Perdue, he purchased with a knowledge of the privilege enjoyed by the Company. So far as regards the space of one hundred feet, it is perfectly obvious that the only purpose of the intended grant was to protect the road from standing trees on either side. The ground here was already open, and, as the defendant built his house partly within the hundred feet, after his purchase, and in the face of the Company, who interposed no objection, whatever might be the nature or effect of the agreement, they could not now disturb the defendant's pos-

session. In addition to all this, the defendant has ever been, and now is, in the quiet enjoyment of the entire premises, without molestation or disturbance. There is, therefore, no ground, either by law or equity, on which his defence can stand. The postea was properly ordered to be delivered to the plaintiff.

Motion dismissed; the whole Court concurring.

Bellinger, for the motion; *Patterson*, contra.

[1] See 8 Rich. 48. *An.*
See 11 Rich. 91. *An.*

T. E. SCRIVEN *v.* WILLIAM HAYWARD.

In an action of trespass on the case, involving a right to water privileges, the defendant's motion for a survey was granted, though the plaintiff declined to join.

A motion for a rule of survey, which the Court would not have hesitated to grant, having been refused in courtesy to the judge who had rejected the same application at the previous term, an appeal upon the motion was allowed, *pendente lite.*

Before BUTLER, J., at Coosawhatchie, Fall Term, 1839.

These were actions of trespass involving the right to water privileges. The defendant moved for an order to survey the plaintiff's plantation and the adjoining lands of the defendant, and to take the level water course through the same.

The presiding judge would have granted the order without hesitation, but was deterred from so doing by courtesy for the decision of EARLE, J., who had refused it, at a previous term, because the plaintiff declined to join.

The defendant renewed his motion before the Appeal Court, while the case was yet depending.[1]

Curia, per BUTLER, J., held that, under the peculiar circumstances of the case, the motion was properly brought up to this Court. And, although the action was not technically a trespass to try titles, yet it involved the right to a privilege

or easement that could not well be ascertained without a survey. It was an action to try titles to an incorporeal hereditament; and there was no good reason why a survey should not be ordered. The defendant's motion was therefore granted.

GANTT, RICHARDSON, O' NEALL, and EARLE, JJ., concurred.

Colcock and *Hutson* for the motion.

[1] See 2 Strob. 255. *An.*
See 5 Rich. 13. *An.*

THE STATE v. ANDREW MONTGOMERY AND WIFE.

Upon joint indictment, under A. A. 1740, sec. 37, (P. L. 173,) against husband and wife, the former was acquitted, and the latter convicted and fined. The husband was held not to be liable for the penalty imposed on his wife.

Before EARLE, J., at Charleston, May Term, 1839.

"The defendant and his wife, were jointly indicted under Section 37 of the Act of 1740,[1] (P. L. 173,) for killing a slave by undue correction. The husband was acquitted, but the wife convicted, and sentenced to pay the fine prescribed by the Act, to wit, three hundred and fifty dollars, currency, equivalent to two hundred and fourteen dollars and twenty-eight cents. This was a *scire facias*, on the judgment of the Court, to have execution for the fine against the husband. On the return of the *scire facias*, I considered that the State was not entitled to have execution against the husband for the fine imposed on the wife; and it was, accordingly, adjudged that Mr. Attorney take nothing by his motion, and that the *scire facias* be discharged.

"It is moved in the Court of Appeals, to reverse this judgment, and to award execution."

Ground of appeal:—That the husband, during coverture, is responsible for all the legal obligations of the wife; and is,

therefore, liable for a *pecuniary* penalty imposed upon her, by the sentence of the Court, on her conviction for a misdemeanor.

Whatever may be the liabilities of the husband, on account of the obligations of the wife contracted before marriage, or in damages for her misconduct towards individuals afterwards, they are such as can be enforced only by action on the civil side of the Court; and to such action the husband must be made a party. It has never been attempted to make the husband liable, by indictment on the criminal side of the Court, for offences committed by the wife against the State; unless where the law would imply that she had acted under his control, or upon proof that she had acted by his command. On such proof, in a certain order of cases, he would be responsible and she would not.

Whether the offence charged here was one of which both could have been convicted, it is not material to inquire. The husband was acquitted; and the case stands as a separate prosecution of the wife for a public offence against the State. The punishment provided by law, is a pecuniary fine; and this the wife has been sentenced to pay. The verdict shows it to have been a case in which the husband was neither guilty himself, nor liable for the act of his wife. Upon what principle then, can he be held liable to pay the fine imposed on his wife, or, in other words, to suffer her punishment? For public offences, the wife, as an individual member of the community, is liable to be indicted as sole; and, as the state of marriage does not exempt her from prosecution separately, it would be a strange anomaly that the judgment could be enforced against the husband, who is neither an accomplice in her guilt, nor a party to the proceeding. It is said in Hawk., P. C., "If a wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same, (as he may be generally to any suit for a cause of action given by his wife,) and shall be liable to answer what

shall be recovered thereon." But this affords no authority for the proceeding in question. To make the husband answerable, he must be made a party to the action or information in which the recovery is had; whilst, here, the judgment was obtained separately against the wife; and the attempt to make the husband liable is by a supplementary process, afterwards, to enforce the judgment. If liable at all, he was so at first. To sustain this proceeding would be, in effect, to make the wife liable, as a single woman, notwithstanding the marriage, and to make the husband liable for her offence, in consequence of the marriage. This point was settled as long ago as the time of James I. By the several statutes of Elizabeth, against recusancy, it was provided, that the fines imposed by those statutes on persons who absented themselves from the established church, or attended mass, might be recovered by indictment at the suit of the Queen, or by action of debt, bill, plaint, or information, at the suit of an informer. In *Dr. Foster's case*, (11 Rep. 61,)—" a case," says COKE, " that concerned the glory of God and the honor of our religion,"—upon mature consideration of all the statutes of recusants, it was resolved by all the Judges, " that, forasmuch as the remedy of the Queen was by indictment, and the *feme covert* was only indicted, and the husband was not a party to it, he was not subject to the wife's forfeiture; for the husband shall never be charged for the act or default of his wife but when he is made a party to the action, and judgment is given against him and his wife, as for the debt of the wife: but if a *feme covert* be indicted of trespass, riot, or other wrong, then the wife shall answer and shall be party to the judgment only; and therefore the fine set upon the wife, in such cases, shall not be levied upon the husband."

The case of the *King & Parker* v. *Webb*, (Cro. Jac. 480,) is cited on the other side; but that was an information at the suit of the informer, and this point did not arise at all. The question made was, whether a *feme covert*, being convicted

by indictment at the king's suit, was liable to the suit of an informer upon 23 Eliz., after the year that she was convicted. It was said in argument, where the wife is convicted of recusancy, it is usual to seize the lands and leases which her husband hath in her right, by exchequer process; but we are not inquiring whether there be any mode of subjecting the property of the wife, in the hands of the husband, to the payment of the fine imposed on her. It is enough that we are satisfied, on principle and authority, that he cannot be made to pay it out of his own property.

Motion dismissed; the whole Court concurring.

Bailey, Attorney-General, for the motion; *Hunt*, contra.

See 1 Strob. 169. *An.*

JOHN FRAZIER & CO. *v.* THE FIRE AND MARINE INSURANCE COMPANY OF CHARLESTON.

In an action on a policy of insurance of freight lost *in transitu*, the patroon, who was also owner of the boat, was not a competent witness to show that the freight was lost by fire, so as to fix the liability of the insurers.

A fraudulent conversion of freight by one who was both owner and master of the vessel, was not *barratry*; for barratry is a fraud against the owner.

Before BUTLER, J., at Charleston, January, 1839.

This was an action on a policy of insurance of thirty-three bales of cotton, consigned to the plaintiffs, and shipped from Columbia to Charleston on board an open boat, of which one Jesse Floyd was both owner and master. Among other risks, the policy covered those of *fire* and *barratry* of the master, provided he was not consignee of the cargo. Floyd's testimony, taken by commission, was offered. The defendants objected that the owner, being a common carrier, might be held liable for the loss of the cotton, and was not a com-

petent witness. The Court overruled this objection, on the ground that a verdict for or against the underwriters would not be evidence in an action, either by the shippers or by the underwriters, against the carrier. Floyd's testimony was, that he was sole owner of the boat, and the only white person on board of her, when the cotton took fire in the night, and was utterly destroyed. The Court thought, from the other evidence, that the cotton had been fraudulently converted by Floyd to his own use; but charged the jury that such a fraud, under the circumstances, was not *barratry*.

The jury found for the plaintiffs, and the defendants moved the Court of Appeals for a new trial. The grounds of appeal as considered by the Court were,

That the testimony of Jesse Floyd was inadmissible; and,

That the fraudulent conduct of the master, if proved, did not sustain the verdict, for it was not barratry.

Curia, per BUTLER, J. The Court having come to the conclusion to grant defendants a new trial on the first ground, it is unnecessary to consider any other.

The first ground is, that Jesse Floyd, being owner of the boat, was not a competent witness against the defendants. Had Floyd occupied the relation of master to another who was the owner of the boat, he might have been a competent witness; but he was exclusively the owner of the boat himself, and was liable to the freighter for negligence and non-delivery of the goods according to the bill of lading. As a witness, he might exonerate himself from this liability, by enabling the plaintiff to recover a judgment against the underwriters. Such a judgment, when satisfied, would be an effectual bar to the plaintiffs bringing an action against the owner. The interest of the witness coincided with that of the party calling him, and this is, in general, a good objection to his competency. On policies of insurance, a master, (much more an owner,) is not permitted to testify to such

fraudulent acts as would amount to barratry, by way of claim, or defence. Suppose the underwriters, there, had called the witness. The objection would have prevailed; and, if so, why is not the converse good?

This is a question which must be decided by authority. In the case of *Taylor* v. *Mc Vicar*, (6 Esp. C. 27,) Sir James Mansfield held that the master, being part owner, was not a competent witness for the assured, on goods, where the defence was deviation, because he was interested as owner to exonerate the ship from liability. I think the true principle is laid down in *Moorish* v. *Foote*, (8 Taunt. 454; 2 Moore 508.) The principle will appear from a recital of Lord Kenyon's opinion, in the case of *Rothero* v. *Elton*, (Peake's C. 84,) noticed in Philips on Evidence, but not fully reported. GIBBS, C. J. in the case of *Moorish* v. *Foote*, quotes and explains this case with approbation. It was an action on a policy of insurance by the assured against the assurer: *Defence*, that the ship was not seaworthy. Lord Kenyon held that the ship-owner was not a competent witness; because if he proved that the ship was seaworthy he relieved himself from an action by the plaintiffs, for furnishing them with an incompetent ship, to which he would have been otherwise liable. If the plaintiff had recovered a verdict against the underwriters, on the testimony of the witness, that the ship was staunch, they would forever have been silenced as to any action against the ship-owner, for loss arising from his providing them with a ship that was not seaworthy. The principle is this; witnesses are incompetent where they are directly interested in the event of a suit. The judge then went on to apply the principle to the case before him, which was a case for negligently driving a mail coach against plaintiff's wagon horse, whereby he died, and held that the plaintiff's wagoner was incompetent to prove the negligence of the defendant, because he was interested in the

event of the suit, for if the plaintiff recovered on his testimony, the witness would be placed in a state of security.

Apply the principle of these cases to the one under consideration. If the plaintiffs were to recover, they could not sue Floyd, but would place him in a state of security, which he would not otherwise have occupied. For, until verdict against either the underwriters, or the owner of the ship, the freighter has a right to bring his action against either, and where it is a contest between them, neither should be a witness to charge the other. This general principle, I think, may be deduced from the authorities, which are somewhat conflicting on the subject. The conflict has arisen from the difference of circumstances which have distinguished the cases. The general principle seems to be acknowledged, but its application has not always been made with uniformity and precision. In the case of *Gevers* v. *Mainwaring*, (3 Holt's C. 139,) all the authorities on this point are referred to by the reporter. In that case it was decided that a broker was a competent witness to prove a contract; but, in an action brought against the principal for negligence and misconduct, in the course of his employment in the purchase of certain bales of tobacco, the broker who made the contract for him could not be called to prove that there was no negligence or misconduct in the execution of it, without a release from the principal.[1]

It may be in the power of the plaintiffs to prove, as I think was established in the trial below, that Floyd fraudulently converted the cotton to his own use, and, if this was barratry, it was a risk covered by the policy. Could this position be sustained, the verdict might stand independently of Floyd's testimony. But all the English and American authorities are against it. The general definition of barratry is a wrongful violation of trust by the *master and mariners* against the interest of the owner. It presupposes the relation of owner and master. In *Nutt & Bodeau*, (1 T. R. 330,) Lord Mans-

field considered the point fully. He says, "the point to be considered is, whether barratry, in the sense in which it is used in our policies of insurance, can be committed against any but the owner of the ship, and it is clear beyond contradiction, that it cannot. For barratry is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the *owners of the ship*. The words used are master and mariners, which are very particular. *An owner cannot commit barratry*. He may make himself liable, by fraudulent conduct, to the owner of the goods, but not as for barratry." Since this decision, the question has never been doubted in the English or American courts, but has been frequently recognized when the owner and master was the same person.

The motion for a new trial is granted.

The whole Court concurred.

Grimke, for the motion; *Thompson* and *Hunt*, contra.

[1] See 9 Rich. 342. *An.*
See a subsequent case, *Lyles* v. *McFie*, 1 McM. 21. *An.*

J. W. EARLE *v.* HENRY MIDDLETON.[1]

In case of eviction, the measure of damages, on the covenant of warrantry, is the purchase money with interest from the date of the purchase.

"There is no case of eviction actually or constructively, by *paramount title*, where the party's right to interest could be defeated by the reception of the rents and profits." —*O'Neall, J.*

Before EARLE, J., at Charleston, June, 1839.

Action of covenant, on a warranty in a deed dated May 18, 1820, by which defendant conveyed to G. W. Earle ten hundred and twenty acres of land for eight thousand dollars. The writ, declaration, and verdict in an action, *Earle* v. *Thompson*, were introduced. In that action Middleton was vouched, and, by the verdict, one hundred and thirty-one acres, parcel of the

ten hundred and twenty acres, found to be the freehold of Thompson, the defendant. The writ in that case was issued on September 14, 1831.

E. B. Benson proved the land recovered by Thompson to have appreciated in value. But at the time of the purchase, on a comparison of prices, supposing eight thousand dollars to be the price of the whole plantation, the part in question was worth no more than four dollars per acre. Plaintiff had possession of the whole plantation till the eviction, but never cultivated this part.

His Honor instructed the jury that the measure of damages was the purchase money and interest, and left it to them to say whether the interest should run from the purchase, or the eviction; and stated that, if the date of interest was to be regulated by circumstances, the circumstances of this case were such as to show that interest should run from the time of eviction only. But the jury found for the plaintiff, five hundred and twenty-four dollars, with interest from May, 1820.

The defendant appealed and moved for a new trial, unless the plaintiff would remit the interest from May, 1820, to September, 1821, on the following grounds:

That from the nature of a contract of indemnity, the compensation should be according to the prime cost, with interest from the time of loss, or eviction; and that this principle has been adopted as the rule of damages by the act of the Legislature, and his Honor, instead of leaving the matter to the jury, should have instructed them that interest could only be allowed from the time of eviction.

That if the date from which interest is to run be a question for the jury, the circumstances of this case afford no ground to allow interest from the time of the purchase; and that the verdict of the jury is partial, unjust, and against evidence, as well as against the charge of the Court.

Curia, per O'NEALL, J. In the case of *Bond* v. *Quattle-*

baum, (1 M'C. R. 584,) decided in 1822, Judge NOTT said, "It is now understood to be a settled rule of law that, when a person has been evicted of land, or what amounts to the same thing, when he is deprived of it by title paramonnt in another, although there has been no eviction, he is entitled to recover back the purchase money, *with interest*, and nothing more." "There may be," he adds, "cases where the rents and profits in the mean time will take away the claim of the party to interest." This last dictum, with unfeigned deference to every thing which was said by the great Judge whose words I have quoted, is, I think, erroneous. There is no case of eviction, actually, or constructively, by *paramount title*, where the party's right to interest would be defeated by the reception of the rents and profits. The defect reaches back to the beginning of his title, and the rents and profits which he has received are not those of his vendor, but those of a third person having the paramount title. The damages recovered in a case of actual eviction, or which may be recovered by an existing paramount title outstanding, are in the place of rents and profits, and represent them in legal contemplation.

The case of the vendee's title defeated by a mortgage, does not conflict with the principles I have stated. The mortgage is a mere incumbrance; it is by the foreclosure only that the right of the mortgagor or his alienee is defeated; and it is, therefore, only an actual eviction under the decree of foreclosure that will entitle the vendee to damages on the covenant of warranty. It is *then*, that, through the defect in his title, his possession is defeated by actual eviction, and he can only have interest from that time. Such seems to be the purport of the decision in *Executors of Withers* v. *Johnson*, April, 1830,* although that can hardly be regarded as

* That case is introduced here, as well for the better understanding of the present one, as on account of the citation of it in 2 Rice's Dig. 192, viz.:

"Action of debt on bond for the purchase money of negroes—plea, *non est factum*;

authority, for the two judges who concurred in the result differed materially in the reasoning by which they arrived at their conclusion, while the third member of the court (JOHNSON, J.) dissented from it; and, in the Circuit Court, GANTT, J. seems to have given no opinion on the law of the case.

The A. A. 1824, sec. 4, (p. 24,) enacts in affirmance of the rule, as laid down in *Furman* v. *Elmore*, (2 N. & McC. R. 189,) *Bond* v. *Quettlebaum*, and the other cases decided at law, "that, in any action or suit at law, or in equity, for reimbursement or damages, upon covenant or otherwise, the true measure of damages shall be the amount of the purchase money at the time of the alienation, with legal interest." Testing the case before us by this Act, or by the rule of law

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on the trial the defendant proved that the negroes purchased were taken away from him by virtue of a mortgage given by Withers, *before his sale to defendant*. The jury found for defendant, and the Court refused a new trial."

EXECUTORS OF R. F. WITHERS *v.* WILLIAM JOHNSON.

Before GANTT, J., at Georgetown, Spring Term, 1830.

This was an action on a bond for one thousand dollars, part of the purchase money of certain land and negroes. The defendant pleaded *non est factum*, and proved that three of the negroes, value eleven hundred and ten dollars, had been taken from him, and sold under an elder mortgage, executed by the vendor.

Verdict for the defendant; from which the plaintiff appealed.

Curia, per RICHARDSON, J. The question for the Court to decide is, can the general verdict for the defendant be supported? The defence to the bond of one thousand dollars was a failure of the whole consideration. This defence the jury have verified. The evidence showed sufficiently, at least after the verdict, that eleven hundred and ten dollars was the price to be paid for the three negroes; that some time after the sale to Johnson, the negroes were taken from him, by virtue of an elder mortgage given by Withers, without notice to Johnson, and sold; at what price is immaterial. It is enough that Johnson lost the negroes by the act of the vendor. The price to be paid was the measure of the bond, and must be the measure of the discount. If we stop here, Johnson ought to have had his bond of one thousand dollars, and the balance of one hundred and ten dollars returned to him. And strictly speaking, the facts reported go no farther. But it appears from the facts involved in the case, or rather from inferences, though not reported, nor used at the trial, that Johnson had the labor of the negroes for some years. This labor, according to a very equitable rule, well established where there is no specific evidence, ought to amount per annum to ten pounds, or forty-two dollars profits per head, and the strict legal verdict might have been for the difference between the value of the

settled long before it was enacted, there can be no doubt that the jury adopted the true measure of damages, in giving to the plaintiff the proportion of the purchase money which the land recovered bore to the whole tract, with interest from the date of his deed.[2]

Motion dismissed; the whole Court concurring.

Petigru and *Lesesne*, for the motion.

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labor and the one hundred and ten dollars which Johnson paid for the three negroes over and above the bond of one thousand dollars. But this difference was neither proven nor insisted upon at the trial. Whereupon the jury found by their verdict that the whole consideration of the bond had failed. And when we consider that the whole fault of selling the negroes before mortgaged, lies at the door of the obligee, that Johnson had been obliged to suffer unexpectedly, a derangement of his contract, and possibly much inconvenience in the domestic relations of his negroes by the loss of three taken from him "*nolens volens*," the Court does not feel itself urged by any strong principle of justice, or rule of law, to send the case back in order that the plaintiff may possibly get a small balance which he did not make plainly appear at the trial already had. And that too, when the verdict is by no means inequitable, and is supported by the evidence actually adduced.

The motion is dismissed. JOHNSON, J., dissented.

COLCOCK, J. I think it the plain case of a loss of property by a title paramount, and the defendant's plea is a suit for the recovery of the value of the property, which, according to the established law, is the price paid and interest, or the value of the labor in the case of negroes.

[1] *Middleton* v. *Thompson*, 1 Sp. 67. *An.*

[2] See 1 McM. 38. *An.*

EXECUTOR OF JOSHUA HICKMAN *v.* R. W. KING & CO.

A merchant agreed with the payee of a bill, who promised that certain produce of the drawer's, whose agent he was, should be sent to him, that he would honor his draft on that condition. The produce was not sent till after the bill had been dishonored and protested, and then only a part, with instructions from the owner to devote the proceeds to other purposes. The payee was nonsuited in his action against the merchant, both as acceptor and for money had and received.

When it is doubtful whether a nonsuit ought to be ordered, the Judge, on circuit, will sometimes, even against the inclination of his judgment, send the case to the jury. But the Appeal Court will not be restrained, by a verdict for the plaintiff, from opening the entire evidence to decide on the motion for nonsuit.

Before EARLE, J., at Charleston, May Term, 1839.

This was an action of assumpsit against the defendants, as acceptors of a bill of exchange, with a count, also, for money had and received.

On December 29, 1836, Hickman wrote from Jacksonville, Florida, to the defendants in Charleston; "Dr. Holland, who bought my place, has authorized me to say that if you would pay me at sight, or thirty days, ten thousand dollars, you shall have his crop that I sold him at Mulberry Grove. If you agree to do it, you must let me know by the return of the mail. I will pay you the amount that I owe you out of the same. He has sixty-six thousand weight of seed cotton in, and is ginning with two horse gins. I think that he will have it to market by the middle of February. He has one hundred and twenty barrels of sugar, which you will get if you pay me ten thousand dollars." The defendants answered, January 4, 1837: "Please say in reply to Dr. Holland, that we shall be much gratified in having the sale of the produce of the plantation he bought from you, and so soon as he sends a bill of lading for the same, shipped to us, that we may effect insurance on the same, we will pay you the ten thousand dollars." On February 21, Dr. Holland drew upon the defendants in favor of Hickman, for seven thousand six hundred

dollars. This draft the defendants refused to accept, because they had, as yet, received no shipment from Dr. Holland; and, at Hickman's request, they returned it protested in form. On March 31, the defendants received from Holland sixteen bales of cotton, thirty-six barrels of sugar, and twenty-four barrels of molasses; and, on April 21, fourteen bales of cotton, two of stained cotton, and forty-three barrels of sugar. (It was in proof that sixty-six thousand weight of seed cotton ought to have turned out sixty bales.) At the same time Hickman renewed his claim upon the draft; but after some little negotiation and delay, the defendants finally refused to make him any advance whatever.

Here the plaintiff closed his case, and the defendants moved for a nonsuit, on the grounds: 1. That the defendants were not liable as acceptors of the bill of exchange, inasmuch as the acceptance was only conditional, and the condition was not performed upon which the liability would attach. 2. That they were not liable upon the count for money had and received, upon any supposition of an implied contract, because an express contract was proved, and because the bill of exchange did not specify the particular proceeds of the crop, as the fund out of which it was to be paid, and was, therefore, not an assignment of the crop or its proceeds. But the Court overruled the motion.

The defendants then proved that Hickman, as agent for Holland, had superintended the getting in of the crop in question, and that it was far short of what he had represented. They showed that the net proceeds of what had come into their hands was four thousand two hundred and thirty-six dollars ninety-eight cents, of which Holland had contracted an account with them for the greater part, and, on May 6, 1837, had drawn upon them in favor of a house in Savannah for the residue.

The Court instructed the jury that the defendants could not be held liable to the plaintiff as acceptors of the bill of

exchange, the acceptance having been conditional, and the condition to be performed by Holland not having been complied with: that on the count for money had and received, the plaintiff might be entitled to recover, or not, according to the view they should take of the circumstances of the transaction. The Court considered the draft drawn by Holland, (which, it seemed to be admitted on all hands, was drawn upon the crop,) as constituting an equitable assignment of the proceeds of the crop; yet, that it was not such as to enable the plaintiff to maintain an action at law; and that the defendants could only be made liable in this action, by some act on their part, before or after the crop came to their hands, by which they agreed or consented to hold the crop or its proceeds for Hickman's use. In that case, if the defendants, at the time of the shipment of the crop, had directions from Holland to pay the proceeds to Hickman, the plaintiff might recover for money had and received to the use of Hickman. The facts were left entirely to the jury. Verdict for the plaintiff, four thousand six hundred and twenty-seven dollars twenty-seven cents.

The defendants appealed, and renewed their motion for a nonsuit.

Curia, per RICHARDSON, J. If the condition upon which King & Co. promised to accept the draft of Dr. Holland was practically fulfilled, it is not to be questioned that King & Co. are as liable as if they had accepted the draft. *Mason* v. *Hunt*, (1 Doug. 297.) It is equally clear that, if Dr. Holland, in the course of the negotiations and arrangements made for meeting the payment of his draft, placed money in the hands of King & Co. for that purpose, then, too, King & Co. may be made liable for the money so received for Hickman. These legal propositions are undeniable; and, the jury having found that King & Co. did receive the proceeds of the Doctor's crop for the payment of his debt to Hickman,

the questions for the Court to decide arise out of the state of facts, from which the jury drew the inference that King & Co. had received such proceeds for that purpose. We have, then, to inquire, 1. whether the condition was fulfilled, entire, so as to compel King & Co. to pay the draft; or, 2. was it fulfilled in part, so as to render them liable for money received for the use of Hickman.

The facts are almost as plain as the law of the case. In answer to Mr. Hickman's letter of December 29, 1836, King & Co., by their letter of January 4, 1837, contracted with Hickman to accept the draft of Dr. Holland for ten thousand dollars, provided the Doctor should send them sixty-six thousand pounds of seed cotton—equal to about sixty bales of ginned cotton—and also one hundred and twenty barrels of sugar. Accordingly, on February 20, Dr. Holland drew in favor of Hickman, for seven thousand six hundred dollars. This draft was returned to Hickman, on March 17, duly protested, because the cotton and sugar had not been transmitted to King & Co., or placed within their control, according to their contract of January 4. At this period, no one can suppose that King & Co. were in any way bound to pay the draft.

Afterwards, however, some cotton and sugar were sent, which would seem to be a partial fulfilment of the condition required by King & Co. But it should be borne in mind, that Hickman, only acting apparently as the agent of Dr. Holland, made the representation of his crop to King & Co., and promised the consignment to them for a certain purpose; whereas, the cotton and sugar were shipped by Dr. Holland himself, without notice of the supposed purpose, and he received the usual advances in such cases; which left a balance of only one thousand six hundred and thirty-seven, out of the sales of four thousand two hundred and thirty-six dollars ninety-eight cents. Holland also demanded this balance, and finally assigned it to a person in Savannah, after King & Co.

had refused to accept his draft to G. Anderson & Son. Here we have a total failure, if not an absolute contradiction, of the consignment to meet the bill, as promised by Hickman. It would seem, from such evidence of his intentions, that Dr. Holland never placed his cotton and sugar at the discretion of King & Co., or considered his crop as pledged in their hands to pay the draft to Hickman. On the contrary, he appears, by his whole conduct, to have repudiated the arrangement, which had been made in his name by Hickman, to meet the draft of seven thousand sixhundred dollars. This course, we may presume, was adopted upon the protest of the draft on March 17, by King & Co. For, although King & Co. afterwards received thirty bales of cotton and seventy-nine barrels of sugar of Dr. Holland, yet these, if we may judge from the use made of the proceeds by Dr. Holland, were placed in their hands for other purposes than to pay the protested draft. What could King & Co. do? They had no discretionary power over the cotton and sugar of Dr. Holland. Unless authorized by him, they could not pay over the amount of sales to the protested draft, or to Hickman: because Hickman himself, (not Holland,) had engaged that Holland's crop should be consigned to them to meet the draft.

It is very rational to presume that Dr. Holland had promised Hickman to fulfil the engagement made in his name, in order to induce King & Co. to honor his draft. But it is clear, from the evidence, that he did not consign any cotton and sugar for such purposes. For some cause, Dr. Holland did not recognize or fulfil the terms and conditions held out by Hickman in his letter of December 29, 1837, upon which King & Co. promised to accept the draft to Hickman.

It is vain to urge that this was the fault of Holland, not of Hickman. That may or may not be. It is enough that the condition upon which King & Co. engaged to accept the draft of Dr. Holland in favor of Hickman did fail. King & Co. did not make the contract with Dr. Holland. They re-

lied upon Hickman, and his warranty was, that Holland would ship the cotton and sugar, for the purpose which he (Hickman) promised, to King & Co. The failure, then, has been entirely in the condition promised on the part of Hickman. And King & Co. continued, throughout the whole transaction, in the same situation in which they were at the time they first protested the draft of seven thousand six hundred dollars. It does not appear that they ever had any of Holland's money that they could legally credit to Hickman. Such an idea can only arise from assuming that Holland shipped his cotton and sugar to King & Co. in order to fulfil the promise of Hickman that Holland would do so for a certain purpose. But it is evident, whatever may have been the understanding between them, that Holland kept his cotton and sugar under his own control and used the proceeds for other purposes.

Where then is the evidence that King & Co. ever had authority to apply the proceeds of Holland's cotton and sugar to the credit of Hickman? We have, it is true, the assurance of Hickman that the cotton and sugar would be consigned for that purpose by Holland. But Holland himself, appears to have discarded every idea of the kind, although he employed King & Co. as his factors. Who then must suffer? Not King & Co., but Hickman, who failed to induce Holland to consign his cotton and sugar for the purpose of meeting his draft. We are unable, therefore, to perceive, in the evidence before us, that the conditional promise made by King & Co. to accept the draft, was at any time binding upon them; because the condition was never fulfilled, either to the amount of the draft, or to the extent of the proceeds of Holland's cotton and sugar. Such proceeds, it is true, passed through their hands as Holland's factors. But they were never placed, by Holland, in the hands of King & Co. to meet the engagement promised by Hickman in the name of Holland. Between the promise of Hickman, of what the

Doctor would do, and the non-performance by the Doctor himself, the condition was never fulfilled, and King & Co. were kept in suspense and powerless from the beginning to the end of the transaction.

It may be difficult to account for such non-conformity between the Doctor's action and Hickman's word. But, assuredly, it does not fall on King & Co. to reconcile their misunderstanding. King & Co. had nothing to do but to receive the cotton and sugar of Holland, either as his factors, or upon such terms as he, not Hickman, might direct. Whereas, the plaintiff's action is bottomed upon the assumption that, if Holland sent his crop to King & Co. at all, the proceeds must go to pay his debt to Hickman, upon Hickman's word, with or without the direction of Holland. That is to say, the promise of the imputed agent, Hickman, is to control the conduct and direction of the actual principal, Holland. And that is to be done, too, to support his action against a new set of debtors, King & Co., in place of Dr. Holland. If Holland had simply consigned his sugar and cotton to King & Co., there would have been reason, under attending circumstances, to imply his assent that the proceeds should go to pay his debt to Hickman; and in this way, a privity between Hickman and the defendants, as to such proceeds, might have been constituted to support the verdict for money received for Hickman. But it belongs to the owner and consignor to direct the appropriation of his consignment, and we cannot imply his assent to a particular appropriation, when he has himself plainly dissented by making a different appropriation. Assuredly, King & Co. could not, upon the promise of Hickman, have resisted a suit brought by Holland for the balance of his crop in their hands. And if so, Hickman cannot recover the same money.

The reasoning and doctrine of the decision in *Williams* v. *Everett*, (14 East. 581,) and the cases referred to, are authoritative, if not conclusive, of this case. Such precedents are

constituent parts of sound judicial decisions at common law, and belong to the full hearing which the common law awards to all parties. It was doubtless upon this last consideration that the Circuit Judge refused a nonsuit in the case before us. That is the usual course of our Courts in cases of complexity, through caution; because, when the judge and jury concur, after a full hearing, the decision often *satisfies* the losing party. Upon the subject of judicial decision, I would observe, that we would have the trial by jury, in the language of our constitution, "as heretofore used in this State, forever inviolably preserved." It affords, perhaps, the most important practical check upon power found in the State constitution. But the qualifying terms "as heretofore used in this State," have their place. And wherever a verdict of indebtedness has been rendered for a plaintiff, whose case is incompetent in itself to constitute the essential premises of such a verdict, there is a counter and conservative check, "as heretofore used in this State," which must also be inviolably preserved. Otherwise, the very veneration, now so justly felt for jury trials, would become a mere name to impose upon the weak and unreflecting. And the court being unanimously of opinion, in the case before us, that there is nothing in the evidence to warrant a verdict for the representatives of Mr. Hickman against King & Co., whatever may be the merits of their claims upon Holland, the nonsuit moved for on the circuit is granted.

GANTT, EARLE and BUTLER, JJ., concurred.

Peronneau, Mezyck and Finley for the motion.

[1] See 1 Rich. 251; 1 Strob. 273. *An.*

SUSAN M. CLEARY *v.* ANDREW M'DOWALL and others.

Where a settlement of real estate was made to the use of husband and wife, during their joint lives, then to the use of the survivor for life, with limitations over, the surviving widow took a freehold estate for life.

Where a woman, seized of a freehold in land for life, married, and during the coverture the land was levied on, and sold under an execution against the husband, who afterwards died, the widow surviving; *held* that the purchaser only took an estate for the life of the husband, and at his death, the widow was entitled to the remainder of her estate.

Before O'NEALL, J., at Charleston, January, 1840.

Trespass to try title. The facts were found, by a special verdict, to the following effect:

The plaintiff, being seized of the land in question, conveyed it by deed of marriage settlement, before her marriage with one Graves, to trustees, "in trust, (after the solemnization of the said marriage,) for the joint use and behoof of the said Samuel Colleton Graves and Susan McPherson, and their assigns, for and during the term of their joint lives, to permit and suffer the said Samuel C. Graves, alone, during the said term, to receive and take the rents, issues, and profits of the said real and personal property, to and for the joint use, benefit and behoof, nevertheless, of both of them, the said Samuel C. Graves and Susan; and from and immediately after the death of either of them, leaving issue alive of the said intended marriage, then to the use, intent, and purpose, that the survivor of them the said Samuel Colleton and Susan, and his or her assigns, shall and may, for and during the term of her natural life, have, take, and receive, to and for his or her own proper use and behoof, the rents, issues and profits of the said real and personal property; and from and immediately after the determination of that estate, then to the use of the said trustees, or the survivor, or the survivors of them, for and during the life of the survivor of them the said Samuel Colleton and Susan, upon trust, to preserve the contingent remainders hereinafter limited from being defeated, and for that purpose to make entries, and bring actions, as occasion may require; but nevertheless in trust to permit the survivor of them the said Samuel and Susan, during the natural life of such survivor, to receive and

take the rents, issues, and profits of the said premises, to and for his or her use and benefit, as aforesaid. And from and after the death of such survivor, then in trust to have and to hold all and singular the said premises, to and for the sole use, benefit, and behoof of the eldest son of the said marriage, living at the time of the death of the survivor of the said Samuel Colleton and Susan, his heirs, executors, administrators and assigns forever; and should there be no son living at the time aforesaid, then in trust to have and to hold the said premises, to and for the sole use, benefit and behoof of the eldest daughter of the said marriage, living at the time of the death of the survivor of them, the said Samuel Colleton and Susan, and to her heirs, executors, administrators and assigns forever; but in case that on the death of them, the said Samuel Colleton and Susan, there should be at the time of such death no issue of the said marriage living, then the said premises to the use of the said Susan, or her heirs, executors, administrators and assigns, forever;" with other contingent limitations, not material to the issue. After the marriage, Graves and the plaintiff entered on the premises, and received the rents and profits jointly, till Graves died, leaving one child of the marrriage living. The plaintiff then kept possession and enjoyed the rents and profits, and afterwards married Nathaniel Greene Cleary. Some years after, the land was taken in execution by virtue of a *fi. fa.* upon a judgment in Common Pleas against Cleary, and "all the right, title and interest of the said N. G. Cleary in the same," was conveyed, by the sheriff of Colleton, to the present defendants. Cleary died in December, 1838, and this action was brought by his surviving widow, to recover the premises and mesne profits from January 1, 1839.

The case being submitted on this finding of the facts, the Court ordered the *postea* to be delivered to the plaintiff.

The defendants appealed, upon the ground that the plaintiff had had a life estate in the premises, which, by her mar-

riage, vested in her husband, N. G. Cleary, and passed, under the sheriff's sale, to the defendants.

Curia, per BUTLER, J. The deed under which the plaintiff claims in this case, has received a judicial construction in the case of *Pringle et al.* v. *Allen*,[1] (1 Hill Ch. R. 135.) The question was, what interest Mrs. Cleary had in a negro which she held under the deed at the time of her intermarriage with Cleary; and it was held that she had a life estate, which was subject to levy under an execution against her husband. The negro, among others, was subject to a trust of a settlement, whereby a large number of negroes and some land (the land now in controversy) were conveyed by Mrs. Cleary to trustees, for the use of Samuel C. Graves, her intended husband, and herself, during their joint lives, and to the use of the survivor for life, and after the death of the survivor, then to the issue of the marriage. Neither the negroes nor the land were ever in possession of the trustees. Mrs. Cleary, at the death of her husband, (Graves,) was in the possession of the land, and in the enjoyment of the rents and profits. She had a freehold interest in it; not under an executory trust, by which the trustees were to receive and pay over the rents and profit to her, but under an executed trust and free from all control of the trustees.

Such an interest could be, and it has been, sold under a *fi. fa.*; and all the interest the defendants have in the land is under a sheriff's deed, founded on the *fi. fa.* against Cleary. Cleary being dead, his surviving widow has a right to the possession of the land. She has asserted her right in this action, and the defendants cannot be permitted to defeat it by denying the title under which they entered. They took it as an executed trust, and cannot now contend that it was executory and not subject to levy and sale; for, had it been so, they ought to have taken nothing by their purchase. *Cestui que use* has a right to the immediate possession and enjoyment of the

land; the use is transferred to the possession, according to the statute of uses; where the trustee is to receive and pay over to the *cestui que trust* the rents and profits, the legal estate is in the trustee. For this general proposition, there can be no necessity to quote authority.

We think the action well brought, and dismiss the motion.

GANTT and EARLE, JJ., concurred.

Hunt and *Memminger*, for the motion.

[1] Overruled by *Rice ads. Burnett*, Sp. Eq. In Errors. *An.*

CHARLES JARVIS, (Assignee of the Sheriff of Charleston,) *v.* SAMUEL ALEXANDER.

There being, in this State, no *ca. sa.* against a female, the return of *nulla bona*, upon a *fi. fa.*, is sufficient to authorize proceedings against the bail of a female defendant, who has not been surrendered.

The bail of a female defendant undertake, not only for her appearance, but that she shall abide by and perform the judgment of the Court: but they may discharge themselves by a surrender of her person.

Bail to the sheriff is not converted, by A. A. of 1809, into bail to the action *for all purposes.*

Before BUTLER, J., at Charleston, January, 1839.

This was an action of debt, upon the bond of the defendant, as bail of Lydia Giberson. The declaration stated that judgment had been recovered against the defendant in the original action; that, as she was a female, the only enforcible execution that the law allowed, a *fi. fa.*, had been lodged in the sheriff's office, and that the sheriff had returned thereon *nulla bona;* that the said defendant had not surrendered herself, nor had she been surrendered by her bail, and that, in consequence, the liability of the bail was fixed. To this declaration the defendant filed a general demurrer, which was overruled by the Court. From that decision of the Court, the defendant appealed.

MAZYCK, *for the motion*, said that, by A. A. 1809,[1] (p. 30,) the bail to the sheriff was, in fact, converted into bail to the

action, (*Stevens* v. *Meeds*, 1 Const. R. M. 318; *Loker* v. *Antonio*, 4 M'C. R. 175; *Harwood* v. *Robertson*, 2 Hill R. 336,) and that the A. A. 1785,[2] (P. L. 369,) and the whole law on the subject of bail to the sheriff, was rendered obsolete. The appellant's responsibility, therefore, was that of bail to the action. As such, his engagement was that the plaintiff should be paid, or that the defendant should be forthcoming to the process of the Court; his liability would be fixed when it appeared that she was not within the reach of that process, (Petersdorff on Bail, 289; 1 Attorney's Pocket Book, 117, 120;) and the way to make this appear was, by *non est inventus* returned upon a *ca. sa.* As the A. A. 1824,) p. 23; 6 Stat. So. Ca. 237,) had deprived the plaintiff of that proof, perhaps inferior evidence might have been admitted; but the fact, however proved, was essential, and was not averred in the declaration. The return of *nulla bona* on a *fi. fa.*, was quite irrelevant as evidence to this purpose. If the bail was liable upon a mere return of *nulla bona*, then he was a surety at all events for the debt; and under that doctrine, every female defendant would be held to bail, while the difficulty of obtaining it would be infinitely increased. It was suggested that the bail might discharge his liability by a surrender before the return *nulla bona:* but, if before the return, why not after? If he was surety for the debt, no surrender could discharge him; but, if surety for defendant's forthcoming to the process of the Court, her having no property to satisfy the judgment, was no default to make him liable. The bail was, in fact, discharged as soon as judgment was had against his principal; for after that there was no further process against a *feme* defendant, and the sheriff could not have detained her if she had been in his custody. If it was otherwise, how long could he detain her? till she paid the debt or took the benefit of the insolvent laws? Then nothing was left, of the exemption from the *ca. sa.*, except that the lien of the judgment and execution

was not dissolved, and the law intended to relieve her sex became an instrument of oppression. The power of the bail, then, being co-extensive with that of the sheriff, (2 Com. Dig. 3,) determined, as his did, with the judgment; and it was law, as well as common sense, that the obligation which had become impossible was discharged; as where a principal died, was made a peer, &c. (Petersdorff on Bail, 389, 394; ——— v. *Shirley*, Douglas R. 45; *Langridge* v. *Flood*, 1 Tidd. 314.) But if he *had* the power, the surrender would have been an idle ceremony. The doctrine here advocated could alone effect the humane intention of A. A. 1824, and did not disturb the decision in *Desprang* v. *Davis*, (3 McC. R. 16,) which might stand independent of it.

YEADON, *contra*, urged that bail to the sheriff was not turned into bail to the action for *all purposes;* but only in respect to the rights, privileges and powers of the latter, which were superadded to the obligations of the former, without either being abolished; and this was all that was intended by the general expressions in *Stevens* v. *Meeds*, (1 Hill R. 318,) and other cases. That they did exist distinct, was proved by the practice of discharging a prisoner, when surrendered by bail to the sheriff, on his giving bail to the action, and was settled in *Chiswell* v. *Ellzey*, (Rice R. 29,) where the right of bail to the sheriff was fully recognized, to surrender their principal previous to that stage of the case when bail to the action would have been necessary, and, therefore, without ever becoming bail to the action. The obligation of the one was for his principal's *appearance* to the action, which can only be effected by entering bail to the action; (*Harwood* v. *Robertson*, 2 Hill R. 336; 1 Sellon's Practice, 137;) that of the other was "to satisfy plaintiff his debt and costs, or to render their principal into his custody, provided judgment should be had against defendant, and defendant himself should fail to do so." (Sellon, *ibid.*) To ascertain the true doctrine of this case, the statutes on this subject must be con-

strued together. The A. A. 1785, gives the plaintiff his *sci. fa.* against the bail to the sheriff, "if the sheriff shall return upon the execution that the defendant is not to be found, or *has no effects* whereon to levy the debt and costs;" but under A. A. 1809, "among the rights, privileges and powers of special bail," the bail to the sheriff acquired that of their liability not being fixed till after a return of *non est.* upon a *ca. sa.* This privilege the A. A. 1824 afterwards repealed, in the case of female defendants, by abolishing the process on which it was founded. But the obligation even of bail to the action, was "to render the body of their principal to his, the sheriff's custody," (Sellon, *ut supra* and 2 *id.* 44)—not that she should be forthcoming to a *ca. sa.*—and the declaration averred the return, *nulla bona*, and the *refusal* to render, as the best evidence the case admitted of the breach of that obligation. The return of *nulla bona* did not fix the bail as a surety for the debt; he might yet discharge himself by a timely surrender. The principle of the bail being discharged of his obligation by its impossibility, (1 Sellon, 167,) applied where the impediment was subsequent to the obligation, not where it existed and was known before: but there was no impossibility; for the sheriff not only could, but must have detained the female defendant in his custody. He could not have discharged her unless by virtue of the insolvent laws, or of a judge's order. A contrary doctrine would involve the absurdity of imprisonment on suspicion of debt, and immediate release upon proof of it. The holding to bail would be a mockery, and the decision in *Desprang* v. *Davis*, if not overruled, would be absurdly evaded. But, above all, in *Jarvis* v. *Gibberson*, (Dudley R. 223,) the Court had refused the application of the party now defendant, to enter an *exoneretur* on this very bail-bond, because "the bond must still stand as the security of the defendant to answer in some shape the judgment and execution." Thus the words of the Court had invited the plaintiff to the course which he

had adopted, for what *execution* was there to be answered, if not the *fi. fa?*

Curia, per O'NEALL, J. Section 4 of A. A. 1824, (p. 28,) provides "that no female shall hereafter be liable to be arrested by any writ of *capias ad satisfaciendum.*" The case of *Desprang* v. *Davis*, (3 M'C. R. 16,) decided in Charleston, at the February term succeeding that enactment, ruled that this Act did not exempt a female from arrest under a bail writ. In the case of *Jarvis* v. *Gibberson*, (Dudley R. 225,) where the principal in this case was defendant, it was held that an *exoneretur* could not be entered on her bail bond. Looking to those cases that have given construction to the Act of 1824, we find that, against a female, the writ of *ca. sa.* is abolished, but still, that she may be arrested and let to bail under a *capias ad respondendum.* The question before us is, what is the effect of bail thus taken? Usually, bail to the sheriff is bail to the action, and his undertaking is, that the defendant shall remain within the reach of the process of satisfaction of the Court. (*Saunders* v. *Hughes*, 2 Bailey R. 513.) Against females, no process of satisfaction can be issued, and, hence, that cannot be the meaning of the condition for her appearance which constitutes the undertaking of bail to the action. If it were otherwise, taking bail would be a mere idle ceremony, and would be as well accomplished by the fictitious bail, John Doe and Richard Roe, as by men of substance like the defendant. But the law requires no such vain and idle ceremony. In the case of a female defendant, may not the undertaking of the bail for her appearance at the return of the writ mean something else than that which is undertaken by bail to the action? I think it does.

Section 3, of A. A. 1819,[1] (p. 60,) declares that bail to the sheriff shall have all the rights, privileges and powers of special bail. The term special bail, as here used, was intended to have the sense attached to it in the county Court

Act of 1785,[3] (P. L. 369,) where the person or persons becoming special bail, are declared to be made liable to the judgment and recovery, unless the body of the defendant be rendered in execution. The defendant has all the rights, privileges and powers of special bail, in exoneration of himself: he may surrender his principal, or she may surrender herself. When this is the case, does it not follow—if for the purpose of giving effect to the law, it be necessary—that the liability incurred is co-extensive with the rights and powers arising out of it? I think this is the rule of reason, and of common sense, which is another name for the common law. No other construction can be resorted to, which will make the bail of a female have any effect. By the adoption of it, the bail is subjected to no liability which he may not discharge by surrendering his principal; so that there can be no hardship.

In *Harwood* v. *Robertson*, (2 Hill R. 36,) it is said that the Acts of 1785 and 1809, have turned bail to the sheriff into bail to the action, or special bail. This case is to be the first illustration of what is meant by turning bail to the sheriff into special bail. Were it not for the Act of 1785, I should hesitate long in saying that bail to the sheriff ever could be regarded as special bail; but coupling the Acts of 1785 and 1824 together, I think we may fairly say that the bail of a female undertakes for her appearance, and that she shall abide by and perform the judgment of the Court. Section 10 of the A. A. 1785, protects the bail from suit until judgment and execution against the defendant and a return of *nulla bona*, when these things are done. It is plain that the defendant has not abided by and performed the judgment by paying it. The motion to reverse the decision of the Court below is dismissed.

RICHARDSON, EVANS, and EARLE, JJ., concurred.*

* This opinion and the succeeding one, are the only two of this term signed by EVANS, J. His Honor was absent during the whole term, on circuit duty.

See 2 Rich. 555; 1 Strob. 306; 4 Rich. 451.

[1] 7 Stat. 309. *An.* [2] 7 Stat. 215. *An.* [3] 7 Stat. 215. See 2 N. & McC. 570. *An.*

R. S. MILLAR *v.* HILLIARD & WADE.

The measure of a verdict for breach of contract should be the damage that the injured party may reasonably have incurred. And the Court will not restrain the discretion of the jury unless it clearly exceeds this limit.

Plaintiff baked certain bread, under directions to go on baking until ordered to stop, and told the defendant his bread was ready; the latter refused to take it, saying he did not want it then. The plaintiff's remedy was damages for breach of contract, not an action for goods sold and delivered; and his book entries were not admissible in evidence. (*Note.*)

But if there had been a delivery and acceptance, under a similar order, in a previous transaction not yet settled, that might perhaps constitute a constructive delivery.

Before EARLE, J., at Charleston, May Term, 1839.

This was an action of assumpsit, for not accepting and paying for a quantity of pilot bread baked for the defendants.

The report of the Judge below was as follows:

"The plaintiff is a baker; and had baked for and delivered to the defendants, who were extensive dealers, large quantities of bread, which were sent for and received by the defendants at their own premises. On February 10, 1838, previous transactions remaining unsettled, the defendants gave an order to the plaintiff 'to go on and bake as fast as possible, until he was ordered to stop.' Upon this order the plaintiff continued to bake, without receiving orders to the contrary, until he had four hundred and seventeen barrels ready for delivery, of which notice was given to the defendants, who replied that they did not want the bread then, but might want it in a month's time: at the end of that period a second notice was given by the plaintiff, and the defendants persisted in refusing to receive the bread. There was no price agreed on, and no specific quantity ordered.

"The plaintiff employed an extra number of hands, and within twenty days after the order, the whole quantity for which payment was claimed, was packed, weighed, marked, and ready for delivery. When refused by the defendants it

was stored away: no attempt was made to make sale of it, and it was retained by the plaintiff until rendered worthless by the weavil.

"The only question was, what damages the plaintiff should recover. The defendants had paid eight cents per lb. for the bread which they had received of the plaintiff; and at the time when the four hundred and seventeen barrels should have been accepted, *i. e.*, from the middle to the last of March, such bread might have been sold for eight or nine cents. In the opinion of one witness, four hundred barrels might have been disposed of at eight and a half cents. The market was fair for such bread up to July, when it became dull, and remained so during the season. Pilot bread well baked and packed in February, would continue nearly or quite as good until June; and one witness sold in July bread baked in February, and it was sound and good. It seemed from the evidence of a judicious auctioneer, that bread sold at auction would not be apt to bring more than a very reduced price.

"The plaintiff doubtless retained the bread under the impression that it belonged to the defendants, and that he was entitled to the full price, as for an article delivered and accepted. I gave the jury full instructions on the question of damages, which are not excepted to, and therefore need not be repeated. The plaintiff, I thought, should recover the difference between the price which the defendants were to pay, (I suppose eight cents, the price of what he had before received,) and what the bread would have brought in market, allowing a reasonable time. Had the plaintiff sold the bread, at whatever loss, he might have recovered the difference in price. If, indeed, the large quantity ordered by the defendants had produced a glut in the market, which prevented the sale of it, then the plaintiff might recover, perhaps, the entire value. Of this there did not seem to be any proof. The jury found for the plaintiff a sum nearly equal to the full price of the bread."

To this it may be proper to add the testimony of Fourgeaud, also a baker, whom the defendants had deceived in the same way, that he had sent part of his bread to Key West, and lost thirty *per cent.* on it; but had lost nothing on the rest; but that an auction sale in November or October would not bring more than two or three cents.

Verdict for the plaintiff, two thousand twenty-nine dollars and thirty-six cents.

The defendants appealed, and moved for a new trial, because the damages far exceeded the loss that would have accrued if the plaintiff had sold within a reasonable time.*

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* This case had been before the Appeal Court at a previous term, (Charleston, February, 1839,) on substantially the same evidence; (only that nothing appeared on the first trial of "previous transactions remaining unsettled" between the parties;) and the Court, *per* EVANS, J., delivered the following opinion on the points then put in issue.

"This was an action of assumpsit. There were various counts in the declaration for work and labor, money paid, and for goods sold and delivered. The whole question arose out of the following account:

MESSRS. HILLIARD & WADE,

To R. S. MILLAR.

1838, April 3,	Barrel, - - - -	180 lbs.	24 to 1,	-	-	$7	50
8,	Keg of Butter Crackers, -	47,	10,	-	-	4	70
9,	Barrel of " " -	97,	10,	-	-	9	70
10,	" " " -	94,	10,	-	-	9	40
20,	417 bbl. Pilot Bread, -	33,301 lbs.	8,	-	-	2664	08
						$2695	38

"The controversy related to the last item of the account. The only count in the declaration on which it could be recovered was the last, which was for goods sold and delivered. It appeared from the evidence, that on February 10, the defendants directed the plaintiff to bake a supply of bread for them. The general direction was to go on and bake until they directed him to quit. About the 20th, the plaintiff was notified that the defendants declined to take the bread, and about that time, the plaintiff tendered the bread to defendants, and they refused to take it. The witness said he tendered it, but I do not understand he did more than to inform the defendants the plaintiff was ready to deliver it. The bread was at the time in Millar's warehouse, where it has remained ever since. It has never been out of his possession. On the trial, the plaintiff produced his book of accounts, wherein he had charged the defendants with the bread, but admitted he had never delivered it. The jury found a verdict for the whole amount of the plaintiff's account, deducting a small discount. There was a great deal of testimony given at the trial, but the fore-

Curia, per EARLE, J. The present motion is to set aside this verdict and grant a new trial, because the damages are excessive in amount, and arbitrary, as not being formed on any just principle or standard, and not sustained by any sufficient proof. The power of this Court to grant a new trial in such

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going statement presents so much of the case as is necessary to the understanding of the points to be decided. These are, 1, Was the book of entries properly admitted? 2, Could the plaintiffs, on the facts stated, recover the full price of the bread, on the count in his declaration for goods sold and delivered?

"The books of a tradesman, mechanic, or shop-keeper, are in general received as evidence of the sale and delivery of goods; but this must be understood in reference to those cases where the contract has been fully executed by the seller. If the action be for non-performance of the contract, then he must recover by proving his contract, and the breach by defendant. In such case, the matter in controversy is not the subject of book account: the plaintiff must make out his case by witnesses. The Judge did allow the book to be produced, and the plaintiff to prove the entries; but upon his saying the bread had not been delivered, the jury were instructed that the book proved nothing, and that they must look to the other evidence to establish the plaintiff's right to recover. I do not therefore think there is any thing in this which would authorize us to grant a new trial.

"On the second ground, I would remark that, in order to maintain *indebitatus assumpsit*, the plaintiff should prove that he at least has performed his part of the contract, or done that which is equivalent; whilst a contract is incomplete, he must sue on the special contract and recover for a breach. If A. sells to B. a horse or a negro, and deliver him, *indebitatus assumpsit* will lie for the price. But if B. refuse to receive the horse, the action must be to recover damages for the non-performance. He cannot sue for the price without delivery, or something which is equivalent to delivery. By tender, I understand some such offer as puts it in the power of the other party to take immediate possession of the thing tendered. If there be a tender of money, the money must in general be produced; and the money must be paid into Court, so that the other party may take possession of it. If A. sells to B. a tract of land, to enable him to recover the price as on a contract executed, he must execute and deliver the title, or must have produced and offered it to the defendant, and must follow this up by depositing the title in Court, so that the defendant may take it out. In the case of *Smith* vs. *Chance*, (2 B. & A. 753,) HOLROYD, J., said, "A party cannot maintain an action for the price of goods sold and delivered, until he has either delivered them, or done something equivalent to delivery, as for instance, if he has put it in the vendor's power to take away the goods himself." If A. sells a horse to B., and he goes to B. and tells him he is ready to deliver him, or even say I tender you the horse, but the horse is in the seller's stable, and not present, so as to enable the vendor to take possession; this would not operate as a transmission of the title to the purchaser, so as to enable him to maintain trover against the vendor; or if the seller had produced the horse, but, on the vendor's refusing to accept him, had carried him home and put him back into his stable, and there kept him; this would not be delivery, or its equivalent. To make a tender effectual,

cases is unquestionable, and has been occasionally, though rarely, exercised. Where there has been no misdirection in point of law, such a power should be exercised with great caution, and only in very flagrant cases, else in the process of time, the judgment and opinion of this court will come to overrule and supercede the judgment and opinion of the jury, on questions of fact, of which they are the constitutional and proper judges. As a general rule, in cases of tort, excess of damages is never a ground for setting aside a verdict; though a case now and then has occurred, where the damages have been so extravagant as to produce a conviction of undue partiality or prejudice. In actions on contracts, there is, in all cases, a just and proper standard by which the damages should be assessed; and when it is obvious that the jury have mistaken, or disregarded that standard, and have given damages for an injury which has not been sustained, or have given compensation in damages extravagantly beyond the

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it seems to me, the seller must, in general, abandon the possession. If he retains possession, the title to the property is not changed, and the vendor's remedy is for damages for the non-performance of the contract. The error has arisen from confounding an offer to perform, which gives the vendor a right of action for non-performance, with such a tender as is equivalent to performance, which vests the property in the vendee, and gives the vendor an action for the stipulated price. In this case it is not pretended, that the plaintiff did more than to inform the defendants the bread was ready to be delivered to them. It was then, and is now, in his possession, and at no period could Hillard & Wade have possessed themselves of it without his consent. As the contract was never executed, he can recover damages for the non-performance only, which the witness thought was about thirty per cent. It is not intended to intimate any opinion as to the amount he ought to recover. If the contract be proved to the satisfaction of the jury, they ought to compensate the plaintiff to the full amount of the injury he has sustained. The extent of this injury is uncertain. It may sometimes be equal to the whole value of the property; but in this case the plaintiff might have made it much less by shipping to Key West, as one of the witnesses did; or he might have reduced it to certainty by selling at auction, as was done in the cases reported in 1 M'Cord, 298, and 5 Johnson, 405. Upon the whole, I am of opinion, the plaintiff cannot recover, on the counts in his declaration and the evidence given at the trial, the full price of the bread. The motion for a new trial is therefore granted; and the plaintiff has leave to amend his declaration, by adding a count or counts, on the special contract."[1]

injury proved, there is then fair ground for the interposition of the Court. Is the case before us one of that description?

In the first place, there was no misconduct on the part of the Circuit Court. The jury, fully and properly instructed, (for there is no exception taken on that ground,) have found an amount of damages beyond what the Court expected. It is clear that they did not mistake the standard of damages laid down by the Court; is it clear that they have wholly disregarded it, or that they have done more than a just latitude of discretion would allow them, in exercising their own judgment, as to the price or value of the bread in market, at the time the defendants finally refused to take it?

There is no doubt, in fact, that the plaintiff has sustained damages beyond the verdict; that he has sustained them without actual fault on his part, and in consequence of the defendants' breach of their agreement; a breach accompanied with striking circumstances of *mala fides*. Now, in assumpsit, it is true, the plaintiff cannot recover for ideal, nor speculative, nor in general, perhaps, for consequential damages.[2] But he may recover, and ought to recover, the actual damages he did sustain, if they were the natural or probable result of the defendants' breach. The whole of the bread ordered by the defendants has been lost to the plaintiff; and it is objected that they ought not to pay for it, because the plaintiff ought to have sold it; that he might have sold it at an inconsiderable loss, and that they should not suffer for his default, or for his ignorance of his rights. This is true, and we should have been better satisfied if the jury had estimated the bread at a higher price than they have done. But on that point there was conflicting testimony. Mr. Forgeaud, another baker, whom the defendants had deceived with the same bad faith, shipped and sold instantly, on their first refusal. They said to the plaintiff, we may perhaps take the bread at the end of the month. He waited, and they again

refused. But warm weather came on, and the bread being in barrels, soon became injured. If the plaintiff had shipped to Key West when Forgeaud did, the market there might have been glutted and neither could have sold. Had he offered four hundred and seventeen barrels for sale in Charleston, in the spring, at auction, the evidence was, that it would have brought only a very reduced price, and this was in consequence of the large quantity ordered by the defendants, and also in consequence of a ship arriving from abroad with the same article. With full and specific instructions that the plaintiff was entitled to recover the difference between the price agreed to be paid and that which the article would have brought in market, allowing a reasonable time to make the sale, the jury have estimated that the bread would have probably brought at auction about two cents per pound, and have found, for the plaintiff, the balance. A majority of the Court, upon full and mature consideration, do not perceive in this verdict, that violation of truth and justice, or that departure from the standard laid down to them, or that disregard of the evidence, which would lead to the belief that it was the result of undue partiality, or prejudice, or of any other improper bias.

There is one feature of this case, which appeared in the last trial, that presents it in a new aspect. The defendants were receiving bread from plaintiff at the time this was ordered, under a previous order for an indefinite quantity. That contract was still open, and the order not filled. Pending this, the defendants say to the plaintiff, "go on and bake as fast as possible, until you are ordered to stop." They gave no order to stop, but afterwards received bread and paid for it. I think on that proof there is great reason to consider the whole as one continuing contract, and that a delivery of part was in law a sufficient delivery of the whole to make the defendants liable. Whatever weight there may be in this view of the case, it is now of no other importance than to

reconcile me the more to the result of the action, which we feel bound to render final.

Motion dismissed; GANTT, EVANS and O'NEALL, JJ., concurring.

Hunt, for the motion.

[1] See 3 Rich. 221; 5 Rich. 252; 6 Rich. 194; 7 Rich. 196—as to tendor. *An.*
[2] See 2 N. & McC. 543; 1 N. & McC. 213, 240; Harp. 87; 11 Rich. 285. *An.*

As to *quantum* of damages. See 1 McM. 116. *An.*

CASES AT LAW,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA.

Columbia—May, 1840.

JUDGES PRESENT.

HON. RICHARD GANTT,
" JOHN S. RICHARDSON,
" JOHN BELTON O'NEALL,
HON. JOSIAH J. EVANS,
" BAYLIS JOHN EARLE,
" ANDREW PICKENS BUTLER.

THE STATE *v.* JAMES R. SMITH.

Shaving the mane and cropping the hair from the tail of a mare in the owner's stable did not constitute the offence of "disfiguring" created by A. A. 1789.

Quere, whether an indictment in the general terms of the A. A. 1789, is sufficient without setting out the manner of disfiguring.

Before O'NEALL, J., at Chesterville, Fall Term, 1839.

The defendant was indicted under section 3 of A. A. 1789, (P. L. 586; 5 Stat. So. Ca. 139,) for disfiguring the prosecutor's mare. The words of the act are: "If any person or persons shall be lawfully convicted of wilfully and knowingly marking, branding or disfiguring of any horse, mare, &c." The indictment did not set out the manner in which the disfiguring was accomplished, but followed the words of the Act, which the presiding judge thought sufficient. The mare's mane had been shaved, and the hair of her tail cropped off close to the bone. Verdict, *guilty*.

The defendant appealed, moving for a new trial, on the ground of certain exceptions to the evidence, which were not considered by the Court, and in arrest of judgment,

Because the indictment did not set out the manner of disfiguring; and,

Because the case proved did not amount to an indictable offence.

Curia, per EARLE, J. The second ground taken, in arrest of judgment, presents the only question we shall consider; that is, whether the act proved against the defendant was indictable under the A. A. 1789, (P. L. 486: 5 Stat. So. Ca. 139.)

By the third section of that Act, a person convicted of wilfully and knowingly marking, branding, or disfiguring any horse, mare, &c., is subjected to a penalty of twenty pounds, and, on non-payment, to be publicly whipped. In construing the Act, it is advisable to refer to its title and to its other provisions, as also to the former laws upon the same subject. The title is, "An Act to prevent the stealing of horses, asses and mules: and for the more effectual prevention of stealing black or neat cattle, sheep, goats, or hogs; and for the punishment of those who shall unlawfully *mark*, *brand*, or *kill* the same." The second section provides a punishment for *cattle stealing*, and the third follows, in immediate connection, imposing the same punishment for marking, branding, or disfiguring either horses or cattle, and a severer penalty in money than is prescribed for stealing sheep, goats, or hogs. The main purpose of the Act was, clearly, to provide adequate punishment for certain offences, which were larcenies at common law, but which had been otherwise punished by former acts. It is material to observe, that the word "disfiguring," is not used in the title of the Act; but the words are, "mark, brand or kill;" and the same punishment is prescribed for those who mark, brand, or disfigure either cattle, sheep, goats

or hogs, as for those who steal them. The first clause of the sixth section, which relates to these smaller animals, has the words "marking, branding, or disfiguring," and the clause which provides for the second offence, has the words "killed, branded, or disfigured" in the same connection. The sixth section forbids a slave to brand or mark any of the domestic animals, except in the presence of a white person and by his direction. If we consider the habit of the country in regard to these animals—that they have always been permitted to roam at large in the fields and forests, the right of property guarded only by such marks and brands as would identify them, and denote the owner—and then view, in connection, the provisions of the Act, we have a sufficient clue to the intentions of the Legislature. These animals were particularly exposed to the depredations of the idle and dishonest ranger of the woods, who might, with great facility, either kill for immediate use, such as were suitable, or endanger the owner's right of property, by "marking, branding, or disfiguring;"—by marking and branding such as were unmarked and without brand; or by disfiguring such as were marked and branded, either by obliterating former marks and brands, or otherwise disguising the appearance and figure in such a way as to prevent the identity from being ascertained. Such was the nature of the offence which the Legislature intended to provide for and punish. Such had been the purport of former Acts on the subject. The first Act was passed in 1743,[1] and was entitled "An Act to prevent stealing of horses and neat cattle, and for the more effectual discovery and punishment of such persons as shall unlawfully brand, mark or kill the same;" and the preamble recites the "great evils of stealing horses and neat cattle, and of unlawfully marking, branding, or killing the same." In 1762 and 1768, an Act was passed,[2] with the same title and similar provisions, which was again revived in 1784, all of them having been limited in their duration. In the Acts of 1762 and 1768, the preamble

is the same, and recites "the stealing of horses, and the stealing and unlawfully branding, marking and killing of neat cattle." Yet, in none of them is there any provision against stealing neat cattle, *eo nomine:* the offence is made to consist in "wilfully killing, marking, branding, or disfiguring any horse, mare, &c., or neat cattle, the property of any other person."

From this reference to former enactments, we think it clear enough that the Legislature looked to the preservation of the right of property against thieves or open trespassers, by guarding those brands and marks which were usually adopted from being obliterated or disguised, and preventing the animal from being otherwise disfigured so as to mislead the owner."

The act charged against the defendant was not of that description. The change in the appearance of the mare was temporary; she was neither branded nor marked, and the cutting of the mane and tail could not have been intended to prevent her being identified, as she remained in the owner's stable. It can only be regarded as a mischievous trespass, and we cannot bring ourselves to view the perpetrator as having incurred the same penalty as if he had stolen his neighbor's cow, or altered the brand of his horse. If to cut off the mane of a horse is to disfigure, the cutting off a goat's beard would be the same; and, without intending to treat the subject with levity, could we consider the cutting off the beard of a ram goat, by a mischievous boy, as equal in guilt, and subject to the same penalty, as stealing him? We do not say that the penalty may not be incurred by disfiguring a horse in his owner's stable, or that the act must be done *animo furandi.* We will leave the cases to be adjudged as they arise; but are of opinion that the defendant has not committed the offence described in the Act. As the manner of disfiguring is not set forth in the indictment, we can only grant

a new trial to enable the defendant to avail himself of this judgment. And it is so ordered.

GANTT, RICHARDSON, EVANS and BUTLER, JJ., concurred.

O'NEALL, J. I think there is nothing in the objection to the indictment. The case of *The State* v. *Cantrell*, (2 Hill R. 389,) was for maliciously killing a horse in the night time, which subjects the party to a heavy penalty; the indictment there followed the words of the Act, and did not set out the manner of the killing: it was held to be sufficient. If that case be law, I am at a loss to conceive why that rule should not govern this. Both indictments are for statutory offences; the former of a much more heinous character than the latter.

If the manner of maliciously killing a horse in the night time need not be set out, it surely cannot be necessary to state the manner in which he was disfigured.[3] But if *our own case* is not a sufficient guide for us, surely *English precedents* will be enough to satisfy the most fastidious. Refer to the forms of indictment under the *Black Act*, and they will be found to be as general as the forms now before us.

The most serious objection is that which makes the question whether the offence made out by the proof be an indictable one. The words of the Act, "wilfully and knowingly *marking*, *branding* or *disfiguring*, describe the offences prohibited. Marking, branding and disfiguring are three offences which may be committed under the Act. To make out the offence of disfiguring, it cannot be necessary to show facts that would make out the offences of marking or branding. An alteration of natural marks whereby a horse is known, is, unquestionably, disfiguring. Why? Because his natural appearance is changed. Cut off his tail; and, if it be a part of the flesh or bone, it is admitted that it would be a disfiguring. When the hair is shaved off, is it not just as much a disfiguring of the horse, and often more, than cutting off his tail? To me it seems to be so. The object of the

Act was not only to prevent the disguising of horses, cattle, &c., "by altering the flesh marks so as to prevent the owners from knowing them," but it was, also, to prevent malicious mischief. The disposition to do that which may vex and harass another, without any benefit to the person doing the act, is, beyond all doubt, as much to be curbed and restrained by law, as that which aims at higher results of crime. This case is an apt illustration of such a law. No one can doubt that the defendant's act was one of mere wantonness and malice. Is it to go unpunished, under a law which covers it in words, and where all the reasons of the enactment would lead us to say that it may be within the intention? For one, I cannot answer in the affirmative. Let the defendant, and all others in a like way offending, be punished, and the security of the citizen in the enjoyment of his property will be established by law, and not only by his own right arm, to which he might otherwise have to appeal.

The only serious objection to this construction of the Act, is the decision of the Court of Appeals in the case of *Gage* v. *Shelton*.[4] But that decision, rightly understood, would not, I think, stand in our way. That was an action of slander: the words, in one of the counts, were, "last night my horse was docked," &c. It was held that these words did not impute the offence of disfiguring; "for," said Mr. Justice JOHNSON, "there is nothing in the mere cutting off the hair of a horse's tail, that is, in itself, so calculated to disfigure that the owner would not know him again; nor was there anything, in the manner of speaking the words, calculated to convey the idea that the defendant imputed that intention to the plaintiff." To dock a horse is anything else than disfiguring him. It is done by some horse jockeys to improve his appearance. The only meaning of the Court in the case referred to is, that such words do not necessarily import the offence of disfiguring. But those words are very different from the charge of shaving off the mane and the hair from

the tail. This constitutes a charge of altering the animal as seriously as if the ears or the tail had been cut off. I am, therefore, satisfied that that case does not stand in our way, and that the words of the Act cover the offence proved. The grounds for a new trial require no comment. The report sufficiently explains the propriety of the evidence recorded, and of the verdict found upon it.

Thompson and *Eaves*, for the motion.

[1] 3 Stat. 603. *An.*
[2] 4 Stat. 177; Id. 284. *An.*
[3] 4 Rich. 193; 1 McM. 476. *An.*
[4] 3 Rich. 242. *An.*
See 7 Rich. 7. *An.*

THE STATE *v.* JOHN WILSON.

Any cruel beating of a slave is punishable under the negro Act of 1740, sec. 45, whether of the same grade of cruelty with the instances specified in the Act or not.

Before GANTT, J., at Columbia, Spring Term, 1840.

Indictment for cruelly beating a slave, under A. A. 1740,[1] (P. L. 173,) sec. 45, viz.:

"And in case any person or persons shall wilfully cut out the tongue, put out the eye, castrate, or cruelly scald, burn, or deprive any slave of any limb or member, or shall inflict any other cruel punishment, other than by whipping, or beating with a horse-whip, cow-skin switch or small stick, or by putting irons on, or confining, or imprisoning such slave; every such person shall, for every such offence, forfeit the sum of one hundred pounds, current money."

The circumstances of the case are detailed in the opinion of the Appeal Court.

The jury were instructed that the words "any other cruel punishment," were not controled in their sense by the previ-

ously enumerated instances; and that any unauthorized cruelty, whether or not of the same grade with those, was indictable under this clause of the Act. Verdict, *guilty*.

The defendant appealed, and moved for a new trial on the ground of error in the Judge's charge.

Curia, per GANTT, J. This was an indictment under the negro Act of 1740, (P. L. 173,) sec. 45, for cruelly beating a slave. The clause in question reads thus; "If any person shall, on a sudden heat or passion, or by undue correction, kill his own slave, or the slave of any other person, he shall forfeit the sum of three hundred and fifty pounds, current money. And in case any person or persons shall wilfully cut out the tongue, put out the eye, castrate, or cruelly scald, burn, or deprive any slave of any limb, or member, or shall inflict any other cruel punishment, other than by whipping, or beating with a horse-whip, cow-skin, switch, or small stick, or by putting irons on, or confining, or imprisoning such slave; every such person shall, for every such offence, forfeit the sum of one hundred pounds, current money,"

The offence charged, and fully proved, in this case, was that the defendant did beat on the head, with a pistol, a negro man slave, named *Stuart*, the property of Loomis & Davis. It did not appear that the negro had in any manner conducted himself amiss, or had said or done any thing to justify the defendant's conduct. Wilson was in a state of intoxication, and meeting with Stuart, a mulatto man, conceived him to be an Indian, immediately struck him several severe blows on the head with a pistol, thereby disabling the slave considerably, and rendering it necessary to send for a physician. After being confined at the place where he was beaten for some days, he had to be sent home to his master.

The Act of Assembly designates the horse-whip, cow-skin, switch, or small stick, as instruments proper to be used for the correction of slaves. To strike, therefore, with a pistol,

over the head, and with violence, an unoffending and unresisting slave, and inflicting serious wounds on the head, thereby disabling the slave for a time to perform service for his master, and subjecting the master to the expense of a physician's attendance, constituted such a beating as, in the opinion of the presiding judge was punishable by indictment, pursuant to the obvious intendment and meaning of the Act of Assembly. The jury were so instructed by the presiding judge, and found the defendant guilty. The case is now brought up on the following grounds.

"That the presiding judge charged the jury that the punishment inflicted on the slave need not be of the same grade of cruelty with those particularized in the statute."

The Court are unanimous that the presiding judge did not err in the construction given to the clause of the Act under which the defendant was indicted.

To beat with a pistol over the head is not with such an instrument as is contemplated by the Act, and in this case, may emphatically be denominated a cruel punishment, and such as subjected the defendant to the penalty of the law.

Motion dismissed; the whole Court concurring.

Cheves, for the motion; *Myers*, for the solicitor, contra.

[1] 7 Stat. 411, § 37. *An.* See Act of 1858, 12 Stat. 738. *An.*

THOMAS SANDERS *v.* R. J. GAGE, Executor of John Rogers.

Plaintiff in sum. pro., having sustained his whole claim *prima facie*, defendant's testimony reduced it to fifteen dollars, and the judge decreed for the plaintiff to that amount. Decree reversed and nonsuit ordered.

Before RICHARDSON, J., at Union, Spring Term, 1840.

Sum. pro. on several distinct items, in all sixty-six dollars and seventy cents. Good *prima facie* evidence was given of nearly the whole amount, but was rebutted by the defendant,

so as to reduce the plaintiff's claim to fifteen dollars and eighteen cents and three quarters of a cent, and interest. As the plaintiff did not appear to have added merely fictitious items for the purpose of swelling his account to the *sum. pro.* jurisdiction, the Court decreed for the plaintiff the amount found due, as above.

The defendant appealed, on the ground that the Court had no jurisdiction over a cause of action less than twenty dollars and ought to have ordered a nonsuit.

Curia, per EARLE, J. The Act of 1824, (6 Stat. So. Ca. 239,) makes the jurisdiction of justices of the peace exclusive, "in matters of contract, to the amount of twenty dollars," with the right of appeal. Upon the construction of that Act, it would seem strange that there should be a difference of opinion, or that there should be any doubt that the jurisdiction depends on the sum proved, and not upon the amount claimed. If it were otherwise, the plaintiff might easily evade the Act, by inserting a plausible claim in his process, upon which some evidence might be offered, although he might know that it would be rebutted. Every plaintiff should be prepared to furnish satisfactory proof of the debt due to him, or of the value of that which he claims; and, if it be at all doubtful, let him, for safety restrict his demand to twenty dollors, as was done in *Goldthwaite* v. *Dent*, (3 McC. R. 296,) where a justice, upon a *quantum meruit* for services, gave judgment for twenty dollars; the proof being that the services were worth from fifteen to fifty dollars. The Court said, "it does not follow, because the plaintiff may have charged more, that he may not charge and recover less." If the construction contended for were adopted, it would be easy for the parties, plaintiff and defendant, by agreement, to secure the jurisdiction of the Court, and evade the wholesome provisions of the Act, which were intended to confine such small and mean causes within the inferior jurisdiction.

The precise question has been several times decided, and cannot be considered as any longer open for argument. *Davidson* v. *Setzler*, (MSS. Col'a, 3 v. 669,) decided in 1827, was like the case now before us. It was a summary process, tried before Mr. Justice GANTT, at Newberry. The plaintiff's demand was an account of twenty-one dollars and fifty cents, for goods sold and delivered. She furnished proof to the amount of sixteen dollars and eighty-one cents, but failed, as to the balance of the amount, to produce legal and competent evidence. A motion for a nonsuit was made, which his Honor overruled, on the ground that the plaintiff's real cause of action was within the jurisdiction of the Court, and it was her misfortune, not her fault, that she failed to establish two items, under the usage and practice of the Court. He therefore gave the plaintiff a decree for the amount proved, and leave to discontinue as to the items not proved. The motion for nonsuit was renewed in the Court of Appeals, and was granted. The Court said, "the Act of 1824 has made the jurisdiction of magistrates exclusive, to the amount of twenty dollars, and therefore the Court has no longer any authority to act in such cases. If the plaintiff fail to prove his account, and cannot show cause for postponement, let him submit to a nonsuit and commence his action again."

In *Harris* v. *Overby*, (MSS. Col'a, 4 v. 491,) tried 1829, plaintiff brought *assumpsit* for one hundred dollars for services rendered as a physician to the defendant's daughter, and proved the defendant's promise to pay. This was rebutted by other evidence, that the plaintiff undertook to make an effectual cure, or to charge only five dollars; that the patient was not cured, and that the defendant's promise to pay one hundred dollars was made under a mistaken belief of her being cured. The Judge charged that the plaintiff, on that proof, could only recover five dollars. But the jury found for the defendant, and the plaintiff appealed. The Court held that the amount proved "was exclusively within a magistrate's jurisdiction;

and, if a plaintiff may, by superadding a fictitious cause of action to the real demand, transfer the cause to the Circuit Court, and recover a judgment, the jurisdiction of magistrates will be annihilated, in violation of the law, and to the great delay of public justice." I have referred thus minutely to these cases, because they are not reported, and may not otherwise become known to the bar. They were followed by *Ferguson v. Teemster*, (1 Bail. 516,) where, in covenant by landlord against tenant for not making repairs to demised premises, the plaintiff proved the value of the repairs to be fifteen dollars, and was nonsuited. It was held, that the demand was exclusively within the jurisdiction of a justice of the peace.

Next followed the case of *Caldwell* v. *Garmany*, (MSS. Col'a, 4 v. 442,) decided in December, 1836, which was a *sum. pro.* on the warranty of soundness of a horse; and Mr. Justice BUTLER nonsuited the plaintiff, on proof that his damage did not exceed twenty dollars, after hearing witnesses on both sides.

It is supposed that the case of *Nance* v. *Palmer*, (2 Bail. 88,) is in conflict with the decisions referred to, and that we are overruling that case. Such is not the opinion of a majority of the Court. In that case, a motion for nonsuit was made in the Circuit Court, after a verdict for the plaintiff, upon the evidence. It was refused, and the decision was affirmed by the Court of Appeals, on the ground that, according to settled rules of practice and pleading, the plaintiff could not be nonsuited after he had a verdict. Mr. Justice JOHNSON, in delivering the judgment of the Court, alludes to the practice of the Courts, in cases where the plaintiff has deceitfully and without any pretence, superadded a fictitious cause of action to a meritorious one, in order to secure a particular jurisdiction, by enlarging the amount; and cites the case of *The Cambridge Association* v. *Nichols*,[1] (1 T. Const. R. 121.) That was upon the construction of the Act of 1769,[2] (P. L. 270,) creating the summary jurisdiction, which authorized the Courts to determine in a summary way "all causes cognizable

in the said Courts, for any sum not exceeding twenty pounds sterling." The jurisdiction there, is made to depend upon the cause of action, the sum or amount of the demand claimed; and the decision in 1 Tread. is not at variance with the view we take of the Act of 1824. Even there, and in cases of like kind, if the demand of the plaintiff, sued for in the general jurisdiction, were reduced by proof of actual payment, to a sum within the summary jurisdiction, the result would be to deprive the plaintiff of more than summary process costs.

In the United States Courts, where the jurisdiction depends upon the amount or sum, the Acts of Congress use the words "matter in dispute." There, the proceedings are stayed at any stage, when it is made to appear that the case is without the jurisdiction. Such, too, is the practice of the English courts; not on the mere suggestion of the defendant, that the sum or debt is too small; but, according to later authorities, always on the affidavit of the defendant, if not denied by the plaintiff; or upon any admission or acknowledgment of the plaintiff, that such is the fact. (2 Black. Rep. 754; 4 T. R. 495; 5 T. R. 64.) Under the former practice, when proceedings were not stayed upon mere affidavit, it was said in 2 Ld. Raym. 1304, "it ought to appear upon the trial, that the cause of action was under forty shillings." From which I infer, if it had so appeared on trial, that the plaintiff could not have had judgment.

If, in *Nance* v. *Palmer*, the motion had been in arrest of judgment, I do not perceive how it could have been refused, without overruling the previous cases of *Davidson* v. *Setzler*, *Harris* v. *Overby*, and *Ferguson* v. *Feemster*. But as the motion was for a nonsuit, after the defendant had gone to a jury on the merits, and the plaintiff had a verdict, on rules of practice it was properly refused. It is urged that the plaintiff having offered evidence, on that part of his demand which is rejected, enough to put the defendant to proof, makes

a different case, to which those cited do not apply. But *Harris* v. *Overby* was precisely the same; and in *Davidson* v. *Setzler*, the presiding judge was satisfied that the rejected items were not fictitious and pretended, but were just. A plaintiff may bring an action by *sum. pro.* with a certainty of recovering over twenty dollars; but, (his demand consisting of several particulars,) a witness to prove some of them dies before trial, or removes, or is accidentally absent, so that he can only prove a demand under twenty dollars. He would stand on stronger grounds of equity and reason, than a plaintiff who includes demands which the defendant proves to be unjust. Why should the latter recover any part of his demand, and the former be nonsuited for want of jurisdiction?

The construction given to the Act of 1824, is congenial to the spirit of former legislation on the same subject; for the Act of 1747,[s] (P. L. 213,) which created the jurisdiction of justices of the peace in civil actions, declared that all suits for the recovery of debts, demands, or damages, to the value of twenty pounds or under, whereby it should appear that the plaintiff has been damnified to no higher value, should be triable only before a justice, and in no other court whatever; making the jurisdiction to depend on the amount or sum proved on the trial.

Without overturning *Nance* v. *Palmer*, or denying its authority, we think that the plaintiff in the case before us, having established a demand under twenty dollars, was not entitled to a decree. The decree which was pronounced in his favor is set aside, and the motion for nonsuit is granted.

EVANS and BUTLER, JJ., concurred.

RICHARDSON, J., *dissenting.* In this case the plaintiff gave good evidence of his demand to the amount of sixty-one dollars; but the defendant then gave counter evidence, that reduced the debt to fifteen dollars and interest. The plaintiff could not be nonsuited upon the defendant's evidence; so the judge decreed for the fifteen dollars and interest.

The case of *Nance* v. *Palmer*, decided by the Court of Appeals, (2 Bailey R. 88,) was in the same situation; but the *sum. pro.* was referred to the decision of a jury, who found for the plaintiff fourteen dollars. Upon this verdict, judgment was given for the amount of the verdict; and the Court of Appeals supported the judgment as within the proper jurisdiction of the Court. Now, if in that case the presiding judge had given a decree for fourteen dollars, could that have taken the case out of the jurisdiction? Whether upon verdict or decree, it is the *Judge* that gives the judgment within his jurisdiction. The jury were no more than the agents of the Court, in order to fix the amount of the defendant's indebtedness; which being so fixed, the judge gives judgment to the plaintiff. The verdict cannot make jurisdiction. If the case be without the jurisdiction, the verdict is a legal nullity upon which no judgment can be awarded by the judge. Even the consent of the litigants, an award or a confession of judgment cannot give jurisdiction. The case would be out of Court and void *per se*. But in all such cases, the want of jurisdiction must appear from the case itself, as an inference from its facts.

Apply the case of *Nance* v. *Palmer*, to the one before us. If the judge had referred *Sanders* v. *Gage* to the jury, and they had found fifteen dollars due, the verdict would have stood, and the judgment of the Court would have been right. But the judge, without requiring the aid of a jury, gives judgment for that amount, and then, according to the argument, the amount is out of his jurisdiction, and the judgment void. It would follow, then, that the amount of indebtedness being ascertained by a jury, may, in such case, give jurisdiction; but the same truth, when ascertained by the judge, or even by the confession of the parties, has no such effect. The inconsistency cannot be reconciled; and if *Nance* v. *Palmer* be law, the decree in *Sanders* v. *Gage* was right. And I now propose to prove it a sound decision.

The *rationale* of *Nance* v. *Palmer* is that, if the creditor has *prima facie* proof that the debt amounts to more than twenty dollars, he may and must demand it in the Circuit Court. For, if he sue before a magistrate, his own evidence must put his case out of Court, and he would be without remedy. The counter evidence of the debtor, which may or may not exist, and is unknown to the plaintiff, cannot, therefore, affect the jurisdiction, which necessarily depends on the case as proved by the plaintiff. Take, for illustration, the counter case to the one before us. A. sues B. before a magistrate for fifteen dollars and proves that amount; A. is in Court. B. then adduces evidence to prove the debt fifty dollars. Can that take the case out of the jurisdiction, and take it out of Court? If it can, A. can get judgment nowhere; for, upon his own evidence, he must be nonsuited in the Circuit Court; and his case is without a remedy. The same would be the case where A. sued B. for eighty dollars in a *sum. pro.* and proved the amount, if B. should then prove the amount ninety dollars. A. would be nonsuited upon B.'s evidence; whereas the legal principle is that, if the plaintiff be properly in Court by his own testimony, he can be put out only upon the merits; that is, upon the trial of the issue made up. And this is the proper principle in *Nance* v. *Palmer*. And the same principle illustrates well that the jurisdiction of the case now before the Court depended upon the plaintiff's evidence.

If the summary jurisdiction of the Court were to depend upon the final amount of the indebtedness of the defendant, as apparent from his own evidence, then it would follow that, if A. has two notes of B., each for fifty dollars, he could not sue B. on one, or each of the notes in the summary jurisdiction. For, upon its appearing, on the part of the defendant, that his whole demand was an hundred dollars, A. would be nonsuited. This would also be the case where the defendant reduces the plaintiff's claim by discount to twenty dollars. But it is settled law, that in either of these cases, the plaintiff's

claim is still within the jurisdiction. And, although it is sometimes said that the latter case is kept within the jurisdiction because reduced by discount, yet the true principle of all those adjudications, like that of *Nance* v. *Palmer*, depends upon the plaintiff's case, as shown on his part. If he acted deceitfully, as by joining pretended causes of action, as said in *Nance* v. *Palmer*, he could not succeed. Or, if he denied receipts given, these would form intrinsic and inseparable parts of his own case, and would constitute exceptions to the rule.

Let us now turn to the MSS. case of *Caldwell* v. *Garmany*. I grant, according to that case, the claim in *Sanders* v. *Gage* was out of the jurisdiction, and Sanders ought to have been nonsuited upon the defendant's evidence. We have then to decide between that case and *Nance* v. *Palmer*. But the case of *Nance* v. *Palmer* has been practised upon exclusively. It makes the plaintiff's case, as proved by him, the test of the jurisdiction. On the other hand, if the jurisdiction is made to depend upon the defendant's evidence, no skill or learning can assure a creditor where he may bring his action.

But if such a principle is to prevail, then assuredly the defendant must first plead specially to the jurisdiction, pointing out the proper form, and why the plaintiff's case is not the subject of the jurisdiction, within which it has been brought with apparent right and reason. All such pleas to the jurisdiction require, for justice and safety to the plaintiff, (Cowp. 172; 6 East. 583,) that the true jurisdiction be pointed out. Without such a plea, how are we to give judgment in such a case? We cannot decree *nil capiat*, nor for the defendant; because that would estop the plaintiff's recovery in any Court. We cannot nonsuit the plaintiff, because he has sustained his claim to the extent of sixteen dollars; and we cannot arrest the judgment, because there is no fault in the record.

Is it not then plain that the plaintiff must have his judg-

ment, unless the warrant of jurisdiction appears by his own showing, or is spread upon the record by a plea that designates the proper jurisdiction to which he may be referred for justice? And in summary jurisdiction, all special defences must be pleaded. (*Bailey* v. *Wilson*, 1 Bail. R. 15.) And I am supporting a decision made upon the record and evidence as presented. Thus, then, the case before us is referred back to the plain principle of *Nance* v. *Palmer;* that is, if the *allegata* and *probata* of the plaintiff come within the jurisdiction, the plaintiff cannot be put out of Court, but upon the merits of his case, because a legal cause of action is first exhibited and then proved.

GANTT, J. I concur in this opinion.

[1] 3 Brev. 248. *An.*
[2] 7 Stat. 200. See 4 Rich. 553, note. *An.*
[3] Not in Stat. at large. See 2 Rich. 53; 4 Rich. 553, note. *An.*
See *Vaughn* v. *Cade*, 2 Rich. 50. *Owen* v. *Curry*, 3 Strob. 261. *An.*

GOODWYN, HARRINGTON & CO. *v.* ROBERT DOUGLAS.

A coat, ordered by a customer resident abroad, without instructions as to the mode of conveyance, was sent through the stage coach by the tailor, who paid the freight. The coat being lost in transitu, the vendor had his action against the carrier.

"Where it appears that the goods were delivered at the risk of the vendor, he must bear the loss, if any ensue, and, in general, where he pays the freight, and voluntarily takes on himself the selection of the carrier and mode of conveyance, he must stand to the risk. Where the mode of conveyance is indicated by the vendee, and he is to pay the freight, the converse of the proposition is true, and he will be regarded as having had a constructive delivery made to him from the time the goods are put into the custody of the master or carrier."—*Butler, J.*

"I do not see why the defendant should object to the plaintiff's action, as it is evident he is liable to some one. The judgment in this case will be a satisfaction of the demand against him."—*Id.*

Before BUTLER, J., at Edgefield, Spring Term, 1840.

SUM. PRO. for the price of a coat lost by the defendant, the owner of a stage coach running from Edgefield to Abbeville.

The plaintiffs were merchant tailors, and had made a coat for one of their customers residing at Abbeville. When the coat was spoken for, the plaintiffs said they would send it by the stage. It was delivered to the driver by the consent of the defendant, and was never delivered to the customer; upon which the plaintiffs brought this action against the defendant as a common carrier. It appears, from the opinion of his Honor, as below, that the freight was paid by the plaintiffs.

A motion was made for a nonsuit, on the ground that the customer, the vendee and consignee, should have brought the action. Motion overruled, and decree for the plaintiff.

The defendant appealed, and moved that the decree of the Court should be reversed, and a nonsuit ordered.

Curia, per BUTLER, J. In sustaining the decision below, I do not think it necessary to refer to all the authorities relied on in argument for the support of this motion. I do not controvert the general doctrine, that, when goods are delivered to a common carrier, whether to a master of a vessel or a wagoner, on account, or at the instance of a consignee or vendee, the property shall, *prima facie*, be deemed to be vested in the consignee; subject to the right of stoppage *in transitu* in case of insolvency. In such cases, the carrier ought to be considered as the agent of the consignee, and a delivery to the former as equivalent to a delivery to the latter. The general principle is so, and is recognized in 8 T. R., 330, and 3 Bos. & Pul., 558. But the consignment is always subject to be controlled and explained according to the original intention of the parties, (1 T. R., 480.) Where it appears that the goods were delivered at the risk of the vendor, he must bear the loss, if any ensue; and, in general, where he pays the freight, and voluntarily takes on himself the selection of the carrier and mode of conveyance, he must stand to the risk. Where the mode of conveyance is indicated by the vendee, and he is to pay the freight, the converse of the pro-

position is true, and he will be regarded as having had a constructive delivery made to him from the time the goods are put into the custody of the master or carrier.

In the case of *Vale* v. *Bayle*, (1 Cowp. R., 295,) Lord Mansfield lays down this proposition: "If the vendor take upon himself actually to deliver the goods to the vendee, he stands to the risk; but if the vendee orders a particular mode of conveyance, the vendor is excused." The case of *Davis* v. *James*, (2 Burr., 2680,) was this: the plaintiffs, manufacturers of cloth at *Shipton Mallet*, delivered some cloth to the defendant, a common carrier, to be delivered to one Elizabeth Bowman, at *White Chappel*, and paid the defendant for the freight. The cloth was lost, and the plaintiffs brought their action. It was objected to the action, that the property had vested in the vendee or consignee. Lord Mansfield remarked, that the vesting of property delivered to a carrier, may differ according to circumstances of cases; but it did not enter into the present case. This was an action upon the agreement between the plaintiffs and the carrier: the plaintiffs were to pay him. Therefore, the action was properly brought by the persons who agreed with him, and were to pay him. And what is the real character of the case now before the court? The customer had not bought a coat ready made, which was to be delivered to him by a particular mode indicated by himself; but had ordered a coat *to be made*, which he might or might not receive, and which he might have returned to the plaintiffs at their risk, if it did not fit him, or suit his taste. The plaintiffs, themselves, *were to make* the coat, and suggested the mere mode of conveyance which they intended to adopt to get it to their customer; and when the coat was made, they delivered it to the defendant, the owner of a coach, and paid him the freight. From the nature of the thing to be sent, from the fact of paying the defendant for carrying it, and their indicating the manner of its conveyance, it is evident the plaintiffs undertook to stand by all the

risks of actual delivery to their customer. Their conduct is a practical commentary on their understanding of the contract. The customer has no interest in the matter, and I do not see why the defendant should object to the plaintiffs' action, as it is evident he is liable to some one. The judgment in this case will be a satisfaction of the demand against him. This view of the case is well authenticated by Lord Kenyon's judgment in *Dawes* v. *Peck*, in which he alludes to, and speaks in terms of approbation of the case of *Davis* v. *James*.

Motion dismissed; GANTT, EVANS, and EARLE, JJ., concurring.

JOHN HEARST *v.* GEORGE SYBERT.

A promissory note to the mother of a child who has been beaten, in consideration of not prosecuting, is void. For a parent has no action for an assault and battery on his child.

And the note to the mother will not be considered to be for the child's benefit.

Before BUTLER, J., at Abbeville, Spring Term, 1840.

SUM. PRO. on a promissory note drawn payable to "Mrs. Earnest or bearer."

Jacob Lasseter having fought and beaten the son of Mrs. Earnest, (both were under age,) she demanded permission to punish Lasseter, herself; and, as this was not allowed she threatened to commence a prosecution, or some other legal proceeding against him. The defendant, Sybert, either voluntarily, or at the instance of Lasseter, with a view of stopping the proceedings at law, gave the note in question; expecting that Lasseter's guardian, then absent, would pay it; and the prosecution was dropped.

The plaintiff, who was executor of the will of Lasseter's father, got the note from Mrs. Earnest by substituting others

in payment of it. Lasseter's guardian refused to pay the note, and the plaintiff, therefore, brought this action against the maker.

The Court decreed for the defendant, on account of the insufficiency of the consideration of the notes.

The plaintiff appealed, and moved to reverse the decision of the Court below, on the ground that there was a sufficient consideration.

1. The mother had a right of action for the beating of her infant son, and has sustained a loss by abandoning suit, in consideration of the note.

2. The mother was *prochein ami*, and the note to her was in satisfaction of her infant son's right of action, and should be considered to be for his benefit, and in trust for him.

Curia, per BUTLER, J., The cases of *Corley* v. *Williams* and *Matthieson* v. *Hanks*, (the first in 1 Bail. R. 588, and the other in 2 Hill R. 525,) have been relied on in the argument of this case.

In the first of these cases, the plaintiff had instituted a prosecution against one Kerksey, for an assault and battery. The defendant was one of Kerksey's securities for his appearance to answer to the charge. Kerksey having absconded, the defendant gave his note in consideration of the plaintiff's dropping the prosecution. It was held that the note was not recoverable, for the consideration was illegal and void. In the case of *Matthieson* v. *Hanks*, subsequently decided, the case of *Corley* v. *Williams* was overruled, and it was held that a note given in satisfaction of an assault and battery is valid. The note, there, was given by the party who had committed the assault to him who had suffered the injury, and who had a right to maintain his civil action for trespass.

The case under consideration is distinguished from the above in several particulars. The note sued on here was

given by a third party, who had committed no wrong for which he could have been held accountable. No action, or right of action against him was compromised, nor was there any consideration by which he could be benefited. But, if Mrs. Earnest, to whom the note was given, had received such an injury as to entitle her to maintain an action at law in her own name against Lasseter, to recover damages for herself, then the compromise of an injury to herself would be a sufficient consideration to support the promise, whether the defendant was to be benefited or not.

I think it very clear that Mrs. Earnest could not have brought a civil action against Lasseter in her own name, to obtain compensation for any injury to her legal rights. For any trespass on the person of a minor, or for any injury to his reputation by defamatory words, the action is always brought in the name of the minor by his guardian or *porchein ami;* and, for the same reason that an action should be thus brought for an injury to a minor's land, or personal property, viz., because the proceeds of the verdict would belong, not to the guardian, but to the minor. So far as regards their rights in such cases, the parent occupies the place of the guardian. I do not think a case could be quoted where the action has been brought, in the name and for the benefit of the parent, for an assault and battery on the person of his child. For the seduction of a daughter, the parent brings the action *per quod servitium amisit;* but this is an acknowledged exception to the general rule, and for reasons which peculiarly concern the parent's household and sanctity of habitation. A fiction is resorted to, to give a remedy for a wrong as nearly personal as can be, without affecting the individual, or by marriage, the relative identity of the parent. the note, in this case, was made payable to Mrs. Earnest or bearer, and for her own benefit, not to her for the benefit of her child. The child may yet have his right of action against Lasseter.

According to these views, the decision below should be supported, but there is another view that may be taken, and which will equally support the Circuit decision. Hearst, the plaintiff, having in his hands, as executor, the funds of young Lasseter, had a right to make payments, on his account and for his benefit. The note given by the defendant to Mrs. Earnest, was taken up by Hearst, at the instance, it would seem, of Lasseter. It was paid off, and should have been delivered to the defendant; and the money paid for it should have been charged as so much paid, laid out and expended for Lasseter's use. If Hearst has imprudently paid over to Lasseter the fund from which he might have retained this sum, let him look to his bond of indemnity, or to such other source as he may think proper, for remuneration.

Motion dismissed; GANTT, EVANS and EARLE, JJ., concurring.

Wardlaw and *Perrin*, for the motion: *Burt* and *Thompson*, contra.

See 2 McM. 356, and *Hudson* v. *Brown & Smith*, Columbia, Dec. 1858, 11 Rich. *An.*

ALEXANDER AUSTIN *ads.* J. W. SIMPSON and others, Commissioners of Roads.

Bond, to "keep up and in good repair," a certain bridge, for seven years, "and fully indemnify and save harmless," the Commissioners for Roads for any injury, loss, &c., they might sustain by its deficiency. The obligor was liable for neglect to repair which occasioned expense *after*, although not during the term.

And it seems he would have been liable for any expense incurred by the Commisioners in making, during the term, proper repairs which he had neglected.

Before EARLE, J., at Laurens, Spring Term, 1840.

This was an action against Austin, as security of one

Campbell, upon a penal bond. This instrument, after the recital that Campbell had built a certain bridge over Little river, under a contract with the plaintiff, was conditioned, "that if the aforesaid Campbell will well and truly keep up and in good repair the aforesaid bridge, for the aforesaid bounds, and fully indemnify and save harmless the aforesaid Commissioners, and their successors in office, against any and all injury, loss, damage, or liability which they may sustain on account of the said bridge, by washing away or [being] out of repair, or in any other manner deficient, for the term of seven years from the date, then the bond to be null and void." Pleas—general performance and *non damnificatus*.

It appeared that the bridge had been very much out of repair, and that the sleepers had twice broken through with loaded wagons. It had been occasionally, but very imperfectly repaired, and was not safe. Loaded wagons were, for a considerable time, compelled to cross by another bridge, five miles out of their way. There was no proof that the Commissioners had ever caused the bridge to be repaired at their expense, or at that of the district, or that actual damage had been sustained by any one: but, if the bridge had been kept in repair, according to the terms of the bond, a new one would not have been necessary for several years longer.

The jury were instructed that they could not find damages against the defendant by way of punishment; that, if losses had been actually sustained, they must be reimbursed; and whatever actual damage had been suffered by the Commissioners, or the public, if they could ascertain it, they must find:—that the terms of the bond were unambiguous, and required the obligors to keep the bridge up and in good repair; and, if in consequence of its not being so kept up, a new bridge was rendered necessary several years earlier than it would otherwise have been, it was a damage for which the plaintiffs were entitled to recover.

Verdict for the plaintiff, twenty-five dollars—the estimated

value of such repairs as would have preserved the bridge, if timely made.

The defendant appealed, by motion for a new trial, on the ground of error in the judge's charge; the bond being in fact only a bond of indemnity for the term specified, and no injury whatever being proved to have accrued to the plaintiffs during that term.

Curia, per EARLE, J. We are all of opinion that the instructions given to the jury were very proper, and, at least, that the defendant has no cause to find fault with them. The condition of the bond is, clearly, a covenant to keep in repair, as well as to indemnify and save harmless. If the commissioners, on the bridge falling out of repair, had, after notice to the defendant, caused it to be thoroughly repaired at their own charge, they could have recovered from the defendant the full amount laid out. I cannot understand how an obligation such as this can be construed to mean only a covenant that the bridge shall remain standing until the end of the specified term, although it may be impassable, and, if the forbearance of the community saves the commissioners from prosecution, that the covenant goes for nothing. We cannot so construe the condition of the bond, without repealing a material clause of the covenant, and the first that is set down, "that if the aforesaid Campbell will well and truly keep up and in good repair the aforesaid bridge." On the construction contended for, we must strike that out, or declare that it has no meaning.

There were no actual losses proved to have been sustained by individuals. Whether such a covenant would render the obligor liable to make good the damages sustained by private persons, in consequence of the bridge being out of repair, may deserve serious consideration. The question does not arise here, and need not be discussed. As none were proved, and as the commissioners had not been indicted, there seems

to have been no other just standard of damages than that which was adopted, unless the penalty were to be regarded as stipulated damages, which could hardly have been intended. If, in consequence of the bridge being permitted to fall into decay, without timely repairs, the Commissioners, acting for the public, were obliged to cause a new bridge to be built much earlier than would have been necessary if such repairs had been made, it would seem to be a damage naturally resulting from the defendant's breach of his covenant, and would entitle the plaintiffs to recover the amount which such reasonable repairs would have cost; unless, indeed, it be held that the covenant and obligation were intended solely for the personal security and protection of the Commissioners, as individuals, which does not deserve consideration.

The motion for new trial is refused.

The whole Court concurred.

Irby, for the motion.

JANE STEEL *v.* JENNINGS & BEATTY.[1]

To charge a firm with money borrowed by a partner, it is enough that the borrowing was on the *credit* of the firm, whether for *its use* or not.

Before RICHARDSON, J., at York, Spring Term, 1840.

This was an action for money borrowed by Jennings, who had been a partner in trade with Beatty. Beatty's defence was, that it was no partnership debt. On this point, the jury were instructed that the question was, did Jennings borrow the money for himself only, or for the firm?

Verdict for the plaintiff against Jennings, but in favor of Beatty.

The plaintiff appealed, and moved for a new trial, on the ground that the true issue should have been, whether the plaintiff had lent her money on the faith and credit of the firm.

Curia, per RICHARDSON, *J.* The proper principle of the case is that, if the money was borrowed by Jennings upon the credit of the firm, no matter to whose use it was applied, or to be applied, the lender ought to recover against both the partners.

But, in charging that the true question was, "did Jennings borrow the money for himself only, or for the firm?" the Court should have said, "for himself only," *and upon his own credit only.* Otherwise, it would be implied that, although the money may have been borrowed on the credit of the firm, yet, if for the use of Jennings alone, the lender could not recover from the other partner; and the jury may have been led into error in regard to the precise legal principle of the case, as that depended upon whether the plaintiff gave credit to the firm, or to Jennings alone.

A new trial is therefore ordered.

The whole Court concurred.

A. W. Thomson, for the motion.

[1] S. C. again, 1 McM. 297. *An.*

A. FITCH, Assignee of Jesse Debruhl, Sheriff of Richland, *v.* JOHN H. HEISE.

Writ served on two and declaration against only one of them is a variance fatal on special demurrer.

On a cause of action, several, as well as joint, plaintiff may discontinue as to the rest, declaring against one, *by leave of Court*, but not otherwise.

Before O'NEALL, J., at Columbia, March, Extra Term, 1840.

Action on the joint and several bond of *Heise*, *Neuffer* and *Straus*. The writ was sued out against them all, served on Heise and Straus, and returned *non est* as to Neuffer. The plaintiff entering on the writ a discontinuance as to Neuffer and Straus, declared against Heise alone. Demurrer for variance between the writ and declaration, was overruled by the Court.

The defendant moved the Court of Appeals to reverse this decision.

Curia, per EVANS, J. There can be no doubt that, according to our practice, a variance between the writ and the declaration is fatal on special demurrer. The decided cases, *Young* v. *Grey*, (1 McC. R. 211,) and *Sargeant* v. *Hayne*, (2 Hill R. 585,) are cases of variance in the cause of action, and not in the parties to the suit, but this I do not consider can make any difference.

I think it equally clear that, where the cause of action is several, as well as joint, the plaintiff may at any time discontinue as to all the defendants except one, and declare and take judgment against him on his several promise, or obligation. This, however, does not authorize him to discontinue otherwise than according to the practice of the Court; and I think all the authorities are, that it can only be done by leave of the Court. (2 Sellon, 334; 3 Tidd. 159.) In this case the plaintiff undertook to discontinue by a mere endorse-

ment on his writ. This was no legal discontinuance, and there was consequently a variance between the writ and the declaration. It is no answer to this to say, the motion is usually granted of course; so also are many others, such as leave to file declarations and to plead double. The motion to reverse the decision of the Court is granted.

GANTT, RICHARDSON, and EARLE, JJ., concurred.

Gregg, for the motion; *Black*, contra.

See Post, 233; 2 McM. 346; 1 McM. 312; 2 Hill, 422; 2 Rich. 12; 3 Strob. 382. *An.*

WILLIAM STUCKY *v.* JAMES CLYBURN.

An express warranty of soundness, in the bill of sale of a negro, precluded the implication of warranty of other representations on the same paper; as, that the negro was forty years old.

A written warranty cannot be limited by parol evidence, (as, of the purchaser's knowledge of a defect,) unless unintelligible without it.

A *hernia*, known to the buyer of a negro, was not one of those "defects that are plain and obvious to the senses of the purchaser, and required no skill to detect them," and which are not covered by an express warranty of soundness.

As to such obvious defects as are excepted from the scope of an express warranty, "I should rather conclude that the defects mentioned are exempted from the warranty, not because they are obvious to the purchaser's senses, but because they are not cases of unsoundness."—*Evans, J.*

Before O'NEALL, J., at Kershaw, Spring Term, 1840.

Assumpsit on the warranty of a negro man, Ned, sold by defendant to the plaintiff. The bill of sale was in consideration of seven hundred dollars, described Ned as about forty years of age, and warranted him sound in body and mind.

Evidence was offered to show that Ned was much beyond forty, probably between sixty and seventy years old; but it was not admitted by the presiding Judge, who considered that part of the bill of sale to be mere description, and that

the express warranty of soundness, precluded the implication of any other.

It appeared that the negro was ruptured at the time of the sale, and was worth, then, from two hundred to four hundred dollars; and that he died about a year after. The jury were instructed "that, if the rupture was so apparent that it must have been seen and known by the plaintiff, then the warranty would not cover it, and their verdict ought to be for the defendant. If, however, it was not, that then the plaintiff was entitled to recover the difference of the value of the negro in his unsound condition, and the price paid for him." Verdict for the plaintiff, twelve dollars.

The defendant moved the Court of Appeals for a new trial, on the ground that evidence of the negro's age had been improperly excluded; and also, that the verdict ought to have been either for the defendant, or for such a sum in behalf of the plaintiff, as the evidence proved the negro to have been depreciated by reason of the unsoundness.

Curia, per EVANS, J. On the first ground, I agree with the presiding judge, that the age of the negro, as set forth in the bill of sale, is mere description.[1] It is not unsoundness, and the warranty that the negro was sound in body and mind, precluded the implication that anything else was intended to be warranted.[2] (Chitty on Con. 359; 1 Bing. 324.) The rule in relation to implied warranties is, that they do not extend to defects known to the buyer, and that no implication of warranty can arise, where the defect was obvious to the senses: because such defects were, or should have been, known to him. A different rule, however, must govern in relation to express warranties, and especially those that are written; because the contract is to be construed most strongly against the warrantor, and because, for anything we can know, the warranty was given expressly to cover the existing, known unsoundness. Besides, a written contract can

neither be enlarged nor limited by parol; and to admit evidence that the disease was obvious to the senses, and from hence to infer that the buyer knew of its existence, and consequently, that it is not included in the warranty as understood by the parties at the time, is in no respect different from the admission of parol evidence of an agreement between the parties, that the seller was not to warrant against the defect complained of. In the one case, the general words of the warranty are limited by an inference from the facts; in the other, they are controlled by the parol agreement of the parties; and in both cases the contract is altered, and effect given to it different from its obvious meaning on its face. There are cases in which the facts and circumstances connected with the contract at its creation may be resorted to as a means of interpretation. But they are those where, without it, the contract would be wholly inoperative, because it was unintelligible. Of this description is the case of *Collins* v. *Lemasters & Lee*, (2 Bailey R. 141.) The general rule is, that a contract in writing is to be interpreted by itself, and especially if it has, on the face of it, a plain and intelligible meaning.

I have thought it necessary to say this much on the subject of express written warranty, because, it seems from the report, the presiding judge charged the jury that, if the rupture was so apparent that it must have been seen and known by the plaintiff, then the warranty did not cover it. It seems to have been supposed that this case came within the reasons of the principles stated in *Wallace* v. *Frazier*, (2 N. & M'C. R. 517.) The rule, as stated in that case, (and the same is to be found in Chitty on Contracts,) is, that a general warranty "will not extend to guard against defects that are plain and obvious to the senses of the purchaser, and require no skill to detect them;" and the cases stated are the loss of an arm, a leg, or an eye. It does not seem to me that the fact of the buyer's knowledge does, *per se*, exclude the

case from the warranty; for in the case of *Wallace* v. *Frazier*, it was clear, the disease, was known to the purchaser when he bought, and yet the Court held the vendor bound by the warranty. I should rather conclude that the defects mentioned are exempted from the warranty, not because they are obvious to the purchaser's senses, but because they are not cases of unsoundness. We do not understand, either in legal or common parlance, that a negro is unsound because he wants a leg, or an arm, or a horse because he wants a tail; although the capacity of the negro for work, and the beauty of the horse are both greatly diminished by the defieiency. But, whatever may be the reasons for excluding these cases from the warranty, they do not apply to a clear case of disease.[3]

It is said, (in Chitty on Contracts, 368,) that unsoundness in a horse is any "organic defect, any infirmity which renders it unfit for use and convenience;" and the same definition, as to physical unsoundness, will apply as well to a negro as to a horse. The disease alleged in this case, was a rupture, or what is called hernia. It is frequently very obvious, but its effects on the value of the negro, it requires skill and knowledge to ascertain. Sometimes it is of no little injury to him, in other cases he is rendered wholly worthless. It is not a defect that it requires "no skill to detect." In many cases no skill, or science can ascertain its effects fully; they are developed by time alone. It seems to me that this case is unlike the loss of a leg, or arm, and that it cannot be excluded from the general warranty against unsoundness, unless we adopt the broad principle that the purchaser's knowledge of the existence of the defect, shall, in all cases exempt the seller from liability on his warranty in cases of express, as well as of implied warranty. For such a principle there is neither argument, nor authority.

For these reasons, it would seem that that part of the charge hereinbefore quoted was error, and, if the jury had

found for the defendant, I should think a new trial should be ordered. But, as the jury found for the plaintiff, the error could not have had any influence on their verdict.

The contract of warranty is an undertaking to indemnify for any injury sustained by the breach of it. What the damages were, it is not easy to gather from the testimony. None of the witnesses express any opinion of the extent to which the value of the negro was diminished by the disease. They say the price was much beyond his value; and it probably was so, even if he had been sound. Diminution of value by reason of a disease is, at best, but opinion, and with all the facts before them, the jury were as competent to form an opinion as the witnesses. We cannot, therefore, say that the jury have found less than the injury sustained by the plaintiff.

Motion dismissed; RICHARDSON, EARLE and BUTLER, JJ., concurring.

Withers, for the motion; *J. M. De Saussure*, contra.

[1] 2 McM. 332. *An.* [2] 1 Strob. 407. *An.*
[3] See 3 Strob. 84; 11 Rich. 15. *An.*

E. R. WILSON *v.* ALEXANDER FERGUSON,

A warranty of soundness given after the completion of a sale, being *under seal*, could not be impeached for want of consideration.

Some months after sale, the purchaser told the seller "he wished to give up the negroes on account of unsoundness," (the negroes not being present.) This was no sufficient tender to rescind the bargain and entitle the buyer to the whole purchase money as damages.

A swelling in the abdomen of a negro woman, plainly visible, and known to the purchaser, it seems was no exception to the general scope of an express warranty of soundness; though no ill consequences were shown from the malformation, and the woman did full work.

Before O'NEALL, J., at Darlington, Spring Term, 1840.

Covenant on an express warranty, under seal, of the sound-

ness of a negro woman. The purchaser, at first, took a bill of sale with only the usual warranty of title; but, a short time after, being so advised by counsel, he demanded an express warranty of soundness. The seller reluctantly executed that on which this action is brought.

The objection to the woman was an enlargement of the abdomen. It was observed at the time of sale by a physician, who examined her, at the plaintiff's request, and advised him not to make the trade. The opinion of witnesses was, that her value was materially impaired by this affection; but she did her full work. Two physicians, examined, said, it was not disease, but an unnatural state of the abdomen, and might be considered a physical defect. The plaintiff gave for the woman, with a sound child, seven hundred and fifty dollars, which was rather below the current price for sound property.

Some months after the purchase, plaintiff told defendant that he wished to give up the negroes on account of unsoundness. The latter replied that he was long in finding that out. The negroes were not then present.

The jury were instructed that the express warranty covered defects known to the buyer, as well as unknown, unless so obvious to the senses that no skill was needed to detect them, but that, in this case, the express warranty having no other consideration but the pre-existing implied one, was only a substitute for that: that there was no tender of the slaves to constitute a rescinding of the contract, and that they could therefore find for the plaintiff no more than the difference between the value and the price given, with interest from the sale. Verdict, fifty dollars.

The plaintiff moved for a new trial on the following grounds:

That his warranty did embrace all defects, as well known as unknown.

That, having tendered back the slaves, he was entitled to the whole purchase money, if to any thing.

That the verdict was not commensurate with the unsoundness proved.

Curia, per EVANS, J. This case, in most of its features, is like the case of *Stucky* v. *Clyburn*.[1] In that case, I took occasion to express my opinion of the nature and extent of an express written contract of soundness, and how far it would be affected by defects known to the buyer at the time. I do not perceive any thing in the charge, as reported, at variance with the principles there laid down. It is stated in the report, that the "jury were told, that generally, when there is an express warranty, it would be wholly immaterial whether the defect was made known to the buyer, or whether the property was examined for him by a physician; for the purchaser then, would have the right to stand on the express warranty, and would be entitled to recover, notwithstanding such proof. It is clear, the Circuit Court did not consider the enlarged abdomen of the woman as one of those defects that are plain and obvious to the senses, and requires no skill to detect them. Her appearance was at least equivocal; it might be disease, or it might be that which would be removed in the ordinary course of nature, and whether it was the one or the other, could be ascertained only by a minute examination and more knowledge of the subject than purchasers generally possess.

It is said, (in Chitty on Contracts, 361,) that a warranty, after the sale was complete, or the contract was performed, would not seem to be binding for want of consideration." This is because the agreement to warrant is gratuitous merely, and not founded on any consideration passing between the parties at the time. And if the contract in this case had been parol, this would have been the case, but no contract under seal is open to the objection that it is *nudum pactum*.[2] And I cannot doubt that this distinction was not present to the mind of the presiding Judge, when he told the jury

that the subsequent express warranty ought to be considered as a substitute for the implied one, "and then, if the purchaser was fully informed as to the condition of the property by the physician, (Dr. Dargan,) he ought not to recover." The jury did not find this fact to exist, for their verdict is inconsistent with it, and it is noticed here only because, as the case may be reported, other persons may be misled by the supposition, that it had received the sanction of this Court.

The only remaining points in the case, are those that relate to the damages. The plaintiff contends that, as he offered to return the negro, he was entitled to recover back the whole purchase money.[3] We concur with the presiding Judge: there was no sufficient tender of the slave to justify a recision of the contract. And besides, the plaintiff's action is on the covenant, and he claims damages for a breach. There have been cases, where the whole amount of the purchase money has been recovered in an action on the warranty, but then it was because the property was utterly worthless, and damages were sustained to the full amount of the money paid. Until the contract is rescinded, or the buyer has tendered it back in reasonable time, which is equivalent to recision if he had a right to do so, no action for money had and received will lie until this is done; the plaintiff's remedy is on the warranty, and his damages must be regulated by the injury he has sustained. Of this the jury were the judges; and it seems to me, that on a question of this sort, with all the facts before them, the opinion of the jury on the amount of damage sustained is entitled to as much respect, and is as apt to be right, as the opinion of the witnesses. The motion is dismissed.

RICHARDSON, EARLE and BUTLER, JJ., concurred.

Dargan, for the motion; *Sims*, contra.

[1] *Ante* 186. *An.* [2] 11 Rich. 132. *An.*
[3] 2 Rich. 46; 2 N. & McC. 45; 2 Mill's R. 75; 2 Brev. 304. *An.*

SAMUEL WOODBURN *v.* ROBERT MILLER.

"A report has gone abroad, through the instrumentality of S. W., stating that R. M. had a load or parcel of falsely packed or plated cotton bales; which report is a direct falsehood." This, printed and published, with malice, was a libel.

A copy of the newspaper in which a libel was published, with proof of defendant's acknowledgment that he had handed it to the Editor for insertion, was proper evidence of publication.

Defendant, in libel, had charged the plaintiff with having falsely accused him of crime. On trial, defendant gave proof, in mitigation, of the falsehood of the accusation; plaintiff was entitled to reply with evidence of its truth.

Before RICHARDSON, J., at Chester, Spring Term, 1840.

Special action for malicious publication of a libel in the "Times" newspaper of June 8, 1838. The publication was as follows;

"A LITTLE CAUTION. A report has gone abroad, through the instrumentality of Samuel Woodburn, stating that Robert Miller, of Chester district, had in Columbia, on the 16th of February last, a load or parcel of falsely packed or plated cotton bales; which report is a direct falsehood. Said Miller had not a single bale of cotton in Columbia, at or near that date, of any description whatever. Meddlers will take care how they distribute falsehoods, lest they meet with difficulties in the way."

The evidence of publication was the printed paper, and proof of the defendant's acknowledgment that he had handed it to the editor at Columbia, with directions to give it three insertions in the "Times" and "Telescope." The defendant objected to this, as not the best evidence, and demanded the production of the original manuscript; but the exception was overruled.

The defendant then moved for a nonsuit, because the publication was no libel. Motion refused.

Evidence being adduced, in defence, that Woodburn had

made the charge of false packing, and that it was false, the plaintiff, in reply, offered proof of circumstances to substantiate the accusation; which was excepted to by the defendant, but admitted.

The jury were charged that the publication was a libel in terms: that the question for them was, whether defendant had published it, and whether he had done so maliciously, and not in self-defence?

The defendant appealed by motion for nonsuit, and failing that, for a new trial.

Curia, per EVANS, J. I propose to consider and decide these questions:

1. Was this a libel?

2. Was the evidence sufficient to charge the defendant with the publication of it?

3. Was it admissible for the plaintiff, in reply, to show that what he had stated of the defendant was true?

There are other grounds taken in the notice of appeal but it is not thought that they are of such doubtful character as to require any opinion of this Court upon them.

1. The plain and obvious meaning of this publication is, that the plaintiff had fabricated and circulated a falsehood about the defendant. Such words, if spoken, would not be actionable; but, according to all the authorities, if printed or written, they would be. (Starkie on Libel, 155; 2 Wilson, 403; *Fonville* v. *McNease*, Dudley R. 303; *State* v. *Farley*, 4 McCord, 117.)

2. The printing of the libel was a publication; and the only question on this part of the case was, did the defendant procure it to be published in the newspaper? As a general rule, it may be laid down, that any fact may be proved by the admission of the party to be charged by it, except those few cases in which the law requires other evidence. If the defendant, after reading the publication in the newspaper, or

hearing it read, had said, "I wrote it and caused it to be published in the Telescope, or Times," could any evidence be more satisfactory of the fact of publication? If so, then it follows that the production of the original manuscript was not, as is contended, indispensable in this case. The defendant's admissions are not as explicit as in the case above stated, but they were evidence of the fact, and, as the result has proved, satisfactory evidence to the jury, that the libellous paragraph in the newspaper was published by the defendant. The general rule is, that a witness shall not be allowed to speak of the contents of a written instrument, because the writing itself is better evidence than the witness' recollection. That was the objection in the cases quoted and relied on in the argument. (*Adams* v. *Kelly*, 21 Eng. C. L. Rep. 403.) But there is nothing in that case at variance with the principles laid down in this.

3. To decide the third ground, it is scarcely necessary to do more than state the facts. The defendant, in mitigation, went into evidence that the plaintiff had propagated the story of his having sold cotton, falsely packed, in Columbia. To this the plaintiff replied by proving the truth of the facts which he had stated, and the information he had received from Scott on the subject. This was, as the presiding judge reports, strictly in reply[1] to the defendant's evidence. The motions are dismissed.

GANTT, RICHARDSON, EARLE and BUTLER, JJ., concurred.

[1] 2 Sp. 79, 638; 5 Strob. 41. *An.*

See 9 Rich. 314; 4 Rich. 258; 1 Rich. 187; Dud. 311; 4 McC. 354; 1 McC. 525; 1 N. & McC. 422; 2 Tread. 809, Appendix. *An.*

JOHN M. DARGAN *v.* WM. E. RICHARDSON, Sheriff of Sumter District.

An assignment, by letter, of goods, to indemnify one who had paid money as security, was good against creditors attaching before the letter was received or the assignment accepted, and took effect from its date.

Before O'NEALL, J., at Sumter, Spring Term, 1840.

The plaintiff, in this case, as security of one Long, paid forty dollars on his account. Long, being about to leave the State, addressed a letter to the plaintiff, making an assignment to him of all his goods as an indemnity. After the date of this letter, but before it reached the plaintiff, attachments had been levied, under which the goods were afterwards sold by the defendant, as sheriff. This action was a *sum. pro.* to recover his forty dollars out of the proceeds of the sale.

As the letter was not a deed, but a parol assignment, the Court thought it was good, and took effect from its date; and decreed for the plaintiff.

The defendant appealed, on the ground that the letter conveyed no interest to the plaintiff till it was delivered and accepted by him.

Curia, per GANTT, J. In reviewing the circumstances of this case, I can see no reason to impugn the decision of the Judge presiding in the court below. It seems to be admitted that the only requisite to complete the transfer, was the acceptance of Dargan. Now, what possible motive could Dargan have had to induce him to decline acceptance? He had been security for Long, and had paid money on account of it; and it would be a singular presumption to infer that he would be opposed to receiving back what he had expended. The presumption of the common law, indeed one of its maxims, if my memory be correct, is, that a man will not renounce that which is done for his benefit. A presumption

verified in this instance, by Dargan's immediate assent on the receipt of Long's letter, to the transfer made in his behalf. From what point of time, then, under existing circumstances, shall this transfer of property, from Long to Dargan, be considered as having taken place. From the date of the letter, or the receipt of it by Dargan? I think that it should be referred back to the date of the letter. It was then that Long, the owner of the property, transferred all his right and interest to Dargan, whose after acceptance consummated the efficacy of the transfer at the time it was made. Thus considered, Dargan became the owner of the property prior to the levying the attachments, and his just claim must have precedence over the claim of the attaching creditors. In this view of the law, I feel myself strongly supported by what was adjudged in the case of *Nathaniel G. Prime* v. *Samuel Yates et al.*,[1] attaching creditors of Lockwood, decided in Charleston in the year 1816, (2 Tread., 770.) The question there involved was elaborately argued by very able and distinguished members of the Charleston bar, Ford, Simmons, Prioleau and Cheves; and the doctrine asserted by Justice NOTT, to which, with Judge GRIMKE, I then assented, seems, yet, for aught that has been urged to the contrary, to be good law. From the close analogy between the cases, the bearing of that opinion may be regarded as decisive upon the present issue.

Lockwood was in Charleston, and owner of the schooner Mary Ann. He was indebted to Prime, the plaintiff, who lived in New York. Blagge, the father-in-law of Lockwood, also resided in New York, and had become security for Lockwood's debt to Prime. Blagge addressed a letter to Lockwood, pressing to be relieved from his responsibility. Lockwood executed a bill of sale to Blagge for the schooner, and inclosed it in a letter addressed to Dr. Joseph Walden, of Charleston, on April 10th, 1808. On the same day, Lockwood wrote another letter to Blagge, informing him that

he had left the bill of sale with Walden for him. Lockwood immediately after put to sea in another vessel, and never returned. Blagge assigned his interest in the schooner to Prime, in discharge of Lockwood's debt. Walden, the day after he received the bill of sale, took possession of the vessel for Blagge; but had received no letters, or other powers from Blagge, constituting him his agent. On April 14, and whilst the bill of sale remained in Walden's possession, the defendants, Yates and others, creditors of Lockwood, levied their attachments.

These were the leading circumstances of the case, and the question submitted for adjudication was, whether Prime, the vendee, or Yates and others, the attaching creditors of Lockwood, were entitled to the property attached. Judge NOTT, who wrote the opinion of the Court, said, that the transfer by Lockwood amounted to a complete divestiture of the property, and that if the consent of Blagge was necessary, it must be presumed from all the circumstances of the case.

I would in like manner say, in the case before us, that the transfer by Long amounted to a complete divestiture of the property, and if the consent of Dargan was necessary, it must be presumed, from all the circumstances of the case; a presumption which has for its foundation the maxim of the common law to which I have already referred. It has been said, that Long might have countermanded the delivery of the letter containing his transfer of the goods, at any time before Dargan received it. That he might have done so, is questionable. That he did nothing to invalidate the efficacy of the transfer, is manifest.

If a bill of sale, (as has been decided,) delivered to a stranger for the use of a third person, is a valid transfer from the date of delivery, if the vendee accepts; by parity of reason, where a transfer of personal property is made by writing contained in a letter, if the person to whom the letter is addressed accepts it, it shall have relation back to the date of the letter.

These circumstances all took place in the case under consideration, and the conclusion to be drawn therefrom is, that Dargan became the owner of the goods from the date of the letter, and is justly entitled, out of the proceeds of the sale, to the amount Long was indebted to him, and for which amount the decree below was given. The appellant can take nothing by his motion, which is dismissed.

EVANS, EARLE, and BUTLER, JJ., concurred.

Richardson, for the motion; *Garden*, contra.

[1] 3 Brev. 559. *An.*
Post 218; 2 Sp. 527; 1 Strob. 47; 2 Bal. 209; Harp. 17. *An.*

DANIEL O. WILLIAMS AND WIFE *v.* JAMES MCALILEY. THE SAME *v.* HIRAM SHANNON. THE SAME *v.* JOSEPH FULLARTON, THE SAME *v.* ROBERT FULLARTON.

The possession of an heir, in land, attaches to and is continuous with that of his ancestor, for the purposes of the statute of limitations.

The possession of a tenant holding under an ancestor, inures to the heir, and constitutes a continuous possession for his benefit.

The tenant of a landlord who died before completing his title by possession, could not hold adversely to his landlord's infant heir, either by taking out a grant to himself, or by attorning to another.

Plaintiff in trespass, a minor, had acquired a title, by possession of part of a tract, with color of title to the whole; but, before her statutory right was matured, the defendant, also with color of title, had settled on part of the same tract, and kept possession for many years. Defendant's title was good to the extent of his actual occupation, before the maturity of plaintiff's right; for it is the *right*, and not the unauthorized possession of a minor, that is protected from the operations of the statute of limitations.

Before O'NEAL, J., at Chester, Fall Term, 1839.

These four cases were actions of trespass to try titles to a tract of land containing nine hundred and forty-two acres.

The plaintiff, Mrs. Williams, was the only surviving child

of Samuel Lacey, who died in Mississippi, in August, 1814. She and her mother, who are residents of Mississippi, are entitled to his real estate in equal moieties. They claimed under a grant to Samuel Lacey, covering the *locus in quo.* It was surveyed for him on April 21, 1800, his plat was lodged in the Surveyor-General's office on October 17, 1800, and the grant issued on November 3, 1800.

Col. Thomas Davis, the agent of Samuel Lacey, rented, in the fall of 1813, the land to one of the defendants, Joseph Fullarton, upon the terms that he was to stay on the land as long as he pleased, paying twenty-five cents per annum rent. He accordingly entered upon the land, and was known as the tenant of Lacey to all the neighborhood, and to the principal defendant, James McAliley, under whom all the others held. On August 3, 1818, Fullarton took out a grant in his own name, for a part of the land covering the spot in his possession. On April 6, 1824, he became the tenant of James McAliley. The defendant, Joseph Fullarton, was examined as a witness by the defendant James McAliley: he said he never would have disputed Lacey's title, that he always admitted he was a tenant under it, and would have given up to Lacey's heirs at any time: he would, he said, have held the land against McAliley if he could. The plaintiff, Mrs. Williams, was born in 1813.

It appeared that the land in dispute was covered by a baronial grant to Edward Lowndes, in 1775; but the defendant, James McAliley, did not enter under nor hold by that grant. He entered into possession of the land in 1817, under a grant to his father, Wm. McAliley, bearing date November 3, 1800; the survey was junior to that of Lacey,—October 18, 1800. Richard McAliley, a tenant of William McAliley, was in possession of the land before 1806. He was sued by Lacey, and a recovery had by default, in 1806; the judgment was signed May 2, 1806. Wm. McAliley knew of this suit, for he told one of the witnesses he had employed

McNeill to defend the suit, and he had lost it. When the sheriff went to dispossess McAliley, and to put Davis, Lacey's agent, in possession, he found the possession had been abandoned. James McAliley has had the occupation of a part of the land since 1817.

It further appeared, that Lacey agreed to give one Ross fifty acres of the land, to take possession and hold for him, and gave him a bond for titles for the same, describing it in such a way that it was marked out on the resurvey plat. Ross took possession within the limits described by his bond, about its date, February, 1803, and continued thirteen years in the actual occupation: he then removed, transferring his bond, by delivery, to Morrison, by whom it was left with Major Kennedy.

The jury found for the plaintiffs, in all the cases, for the land, except that part covered by the bond of Lacey to Ross.

The defendants appealed from this verdict, and moved for a new trial, on the ground of error in the judge's charge. The points to which exception was taken were as follows:

That Fullarton's tenancy under Lacey's title, continued "until he attorned to McAliley in 1824; and even his possession since, as McAliley's tenant, might not enable him or his landlord to hold against Lacey's title, though the heirs had been under no disability; but it was unnecessary to look at that, as Mrs. Williams' non-age prevented the statute of limitations from cutting off any right which she had. I thought that Fullarton's possession, commencing under Lacey, enured to the benefit of the heirs of Lacey; and that it was to be regarded as one entire possession; for the possession of the heir and the ancestor is the same, there being no fresh disseisin, and no new entry. I did not think that Fullarton's new grant ended his tenancy; he still remained in possession, and gave no notice to his landlord of his intention to hold for himself."

That "although the grants of Lacey and McAliley were

issued the same day, yet Lacey's survey being the eldest, made his grant the elder and better legal title."

That even McAliley's claim to the part actually occupied by *pedis possessio* " cannot have effect, for Mrs. Williams was an infant of only four years of age when the possession commenced, and had not attained maturity more than three years when these actions were commenced.[1]

Curia, per BUTLER, J. The report sets out, very clearly and fully, all the facts out of which arise the points of law on which the judgment of this Court is required. When analyzed, the grounds of appeal present the naked question, were the plaintiffs entitled to recover the land by a perfect title acquired under the statute of limitation? If they can connect their possession by Joseph Fullarton's tenancy, with that of their ancestor, Samuel Lacey, the statute confers on them a good title. In other words, they must support the proposition that Joseph Fullarton's possession was that of Samuel Lacey, as long as he lived, and after his death, it was cast on them, and continued without interruption, for five years, under the first entry and disseisin.

In the fall of 1813, Fullarton was put in possession of the land as the tenant of Lacey, and was to hold coextensively with Lacey's grant; which, of itself, could confer no right, but could be resorted to only to indicate the extent of the possession under it. This, in legal contemplation, was the entry of Lacey, and was a disseisin of Lowndes who, at the time, had the true title. Lacey died in 1814, without title in himself at that time, but occupying such a position as might have given him title if he had lived. Had not his heirs a right to be remitted to his rights, or rather to take the position which he occupied, and from which rights might be acquired?

For the purpose of eliciting the true point in the case, let it be supposed that the child of Lacey was on the premises

an infant at the time, and incapable of asserting her claim to the possession. It was said that, under such circumstances, Lacey having no right to the land, none could descend to his heir. And it is true, he had no title. But he had such a *possession* as might ripen into title. This is an interest not of such immaterial consequence as to be unnoticed by the law.[2] Nor is the possession of the heir, thus acquired, to be regarded as a distinct possession, on his own entry, to be tacked to that of the ancestor, but a continued possession that is referable to the original entry and disseisin. So much, according to English law, is this possession of the heir respected, notwithstanding the ancestor may have been a disseisor and wrong-doer, that the true owner's right of entry on it, after the death of the ancestor, would be barred, and he would be driven to his ejectment to enforce his right of entry; although by simple entry, he could have evicted the ancestor in his lifetime. For the law presumes that the possession which is transmitted from ancestor to heir is a rightful possession, until the contrary is shown, and therefore the mere entry of him who has the right will not evict the heir.

In every complete title to lands, there are two things necessary; viz., the possession, or seisin, and the right and property therein. If the possession be severed from the property, as if A. has the *jus proprietatis*, and B, by some unlawful means, has gained the possession, this is an injury to A. for which the law gives a remedy, by putting him in possession; but it does so by different means, according to the circumstances of the case. Thus, as B, who was himself a wrong-doer, and has obtained the possession either by fraud or force, has only a bare, a naked possession, without any shadow of right; A, therefore, who has both the right of property and the right of possession, may put an end to this title at once, by the summary method of entry. But if B, the wrong-doer, dies seised of the lands, then B's heir advances one step further towards a good title. That is, he has not only a bare

possession, but also an apparent *jus possessionis*, or right of possession. (Run. on Eject. 42; 3 Cruise Dig. 433; *Smith* v. *Lorillard*, 10 Johns. R. 338.) This is a recognition of the heir's possession, continued as well as derived from the ancestor. It is inheriting not only the title, but the position by which a title is acquirable. A possession not taken by the option of the heir, but one that is cast on him by the operation of the law.

It was contended, however, that this doctrine only applies to the actual possession of the heir, and not to the constructive and substituted possession of a tenant. This, on examination, will be found to be a fallacy. The lease of the landlord to the tenant descends to the heir, or goes to the executor for the benefit of the heir. By this the tenant could be made to pay rent after the death of his original landlord—as much so as if the landlord had been the true owner of the land. The liability of the tenant to pay rent, is not surely destroyed by the death of the landlord. Take, for instance, the case under consideration. Fullarton was to pay rent for the land as long as he continued on it. Could he not have been compelled to pay it after the death of Lacey? In an action against him, could he have disputed his liability to pay the rent that was due? If not, his tenancy would inure to the benefit of the heir, and his possession would be considered as that of the heir. A recovery on the lease would be equivalent to an acknowledgment of tenancy to the heir, after the death of the ancestor. After Lacey's death, his heirs could have recovered the land from the tenant by the lease under which he entered, although they might not have been able to recover it from another. In this point of view, Fullarton's possession may be regarded as the uninterrupted and continuous possession of Lacey and his heirs; and not as the disconnected possession of the ancestor and the heir, or as the separate possession of Fullarton, after the death of Lacey. As long as Fullarton continued in under the lease

from Lacey, he could not acquire any available title in himself. The grant which he took out in his own name could confer on him no right; as his possession would not be referred to that, but to Lacey's lease, under which he entered and had held.

The case is then reduced to this; had Fullarton five years adverse possession under Lacey's grant, as against Lowndes? He was in from the fall of 1813 till 1814, holding, as he acknowledged on the stand, for Lacey's heirs; or rather, saying that, during that time, he would have delivered possession to Lacey, if demanded. In the fall of 1818, the statutory title became perfect, and was good for all the land which Fullarton was in the actual or constructive possession of; that is, all that lay within Lacey's grant, except what was in the actual occupation of others. And, after that time, Mrs. Williams, being a minor, could not be deprived of any of the land by adverse or collusive possession of any one, until she attained full age. In other words, any possession acquired by McAliley after the fall (October) of 1818, could not avail him, as against the plaintiffs.

As it regards the land which he was in the actual possession of before plaintiff's possession had ripened into a title, it must be regarded in a different point of view, to be noticed presently.[3] Before I advert to that point, I will return to an argument, relied on to show that Mrs. Williams's possession never could have ripened into a right by the trespass of Fullarton. It was said that, although Fullarton would not be allowed to prejudice her right and title to the land, where such right and title existed, yet, when the future acquisition of it depended on his continuing to trespass for her, he was at full liberty to stop trespassing for her benefit to the prejudice of the true owner. To this it may be replied, that if the minor's possession, at the time of the death of her father, were not altogether rightful, as against Lowndes, it was a *possession* which was, at least, recognized and sanctioned by

law, until eviction by action. It does not seem that Fullarton knew of Lowndes's grant, but always supposed that he held for Lacey under his grant. As long as he continued in possession, he would be regarded by the law as holding in the relation in which he entered. He was a sentinel over the rights, or, at least, possession of his landlord, and could not be permitted to betray or jeopard them by acquiring title in himself, or attorning to another. Whatever *others* might have done, *he* will not be allowed to deny the claim of the one under whom he entered. This principle of law is founded in a great principle of morality, that pervades all the fiduciary relations of life; that good faith, where it is honestly reposed, shall not be violated to the prejudice of the one who reposes it. Fullarton's possession must, therefore, be regarded as the possession of Mrs. Williams.

After October, 1818, Mrs. Williams had an actual possession of part, and a constructive possession of all the land lying within her father's grant, *except* what McAliley was in the actual occupation of previous to that time. Or, (to put it in a different form,) at that time, she may be supposed to have bought all the land which Fullarton was in the possession of; and it is clear, that Fullarton was not in the possession of that occupied by McAliley. For, as to that, Lowndes could not be regarded as having it in possession. McAliley occupied such a position as would enable him to acquire title against Lowndes himself, unless evicted before the expiration of five years. This possession controled Fullarton's constructive possession, and, to its extent, has ripened into a title in McAliley; *but beyond it he has no right*, by virtue of any possession acquired after October, 1818. It seems that he did not show, or perhaps was not allowed to show, how much land he had in actual occupation previous to the above time; and he must therefore have a new trial, to enable another jury to find what that possession was, and to find for the plaintiff all beyond it.

The motion is granted only so far as regards McAliley. As it regards the other defendants in the case, the motion is refused unanimously.

RICHARDSON, EVANS, and EARLE, JJ., concurred.

GANTT, J., I dissent, on the ground that there was no descent cast, such as is recognized by law. A trespass constitutes no right or title; therefor nothing descended.

Gregg and *McAliley*, for the motion; *Evans* and *Thompson*, contra.

[1] The report of the Circuit Judge is published *verbatim*, 3 Strob. 477. *An.*
[2] Rice, 10; 5 Strob. 215; 4 Rich. 103. *An.*
[3] Cited, 6 Rich. 299. *An.*
See 3 Strob. 474-6. *An.*

EDWARD BROUGHTON *v.* JEPHTHA DYSON.

Defendant in assumpsit, offered in discount the value of a quantity of yarn, delivered to the plaintiff, more than he was entitled to, by mistake and without plaintiff's knowledge. *Held*, that the discount could not be admitted.

Before EVANS, J., at Sumter, Spring Term, 1840.

This was an action of assumpsit, to which the defendant pleaded in discount, among other things, forty-one dollars and seventy-two cents for one hundred and forty-nine pounds of yarn, at twenty-eight cents per pound.

The facts were these. Plaintiff had delivered two thousand five hundred and twenty pounds of cotton to defendant to be spun at his factory. The yarn produced was one hundred and forty-nine pounds less than the cotton. Defendant made up the deficiency and delivered the whole to plaintiff; the latter, however, knowing nothing about it. Afterwards, defendant ascertained that this deficiency was only the usual

loss that occurred in the spinning of cotton, and therefore charged plaintiff, in his discount, with the value of the yarn so delivered by mistake.

The jury found in favor of defendant's discount; and the plaintiff, on that ground, moved the Court of Appeals for a new trial.

Curia, per EVANS, J., Held that, on this ground, "the motion must be granted. There is no pretence for saying that Broughton bought one hundred and forty-nine pounds of yarn from Dyson. It may be just that he should pay it, and I suppose the verdict of the jury arose from an attempt to do abstract justice between the parties. But all experience proves the folly of any attempt to settle the controversies of litigants by any other than the known and settled rules of law. Broughton's cotton, when spun, was deficient one hundred and forty-nine pounds. Dyson was unable to account for it, and without Broughton's knowledge made up the deficiency. Afterwards, he discovered that the loss in weight was the usual consequence of converting cotton into yarn; and then charged Broughton with the yarn thus delivered. We think there is no foundation for the pretence that this was a sale; and to allow the verdict to stand, would sanction the principle that one may make another his debtor without his knowledge or consent."

Motion dismissed:

GANTT, EARLE and BUTLER, JJ., concurring. *Absent*, RICHARDSON and O'NEILL, JJ.

Moses and *Miller* for the motion.

See 2 Bay, 106. *An.*

THE STATE *ex rel.* of ANTHONY CAMPBELL *v.* COMMISSIONERS OF ROADS FOR LAURENS DISTRICT.

Post Masters are not exempt from road duty.

State v. *Harrington*, (2 McC. R. 400,) and *State* v. *Martindale*, (1 Bailey R. 163,) considered.

Before RICHARDSON, J., at Laurens, Fall Term, 1839.

This was an application for a prohibition to prevent the levying of a fine of eight dollars imposed upon the defendant, a Post Master, for failing to work on the roads. The Court refused the prohibition, and the defendant, thereupon, appealed.

Curia, per EVANS, J. By our Act of 1825, (p. 31,)[1] all the male inhabitants of this State are declared liable to work on the roads, bridges and causeways. The tenth section enacts, "that from and after the passing of this Act, the following persons and no others, shall be exempted from all liabilities to work on roads and bridges, viz.: all ministers of the gospel, millers and ferrymen." This is a most comprehensive enactment. With these few exceptions, the act embraces all the adult male inhabitants of the State.

To show, then, that a Post Master is not liable to work on the public roads, his official exemption must be proved from something paramount to the Act, or that supercedes it in the particular instance. As, for example, that the State Act is opposed to the Federal Constitution, or to some constitutional law of Congress, a treaty, or the like, which constitute our supreme laws. But nothing of the kind is specifically suggested. The ground taken is, that the Post Master is exempt by virtue of his federal commission; that such is the necessary implication of the Federal and State constitutions under their proper construction, forming the conventional law of the confederated States, and binding on the whole Union.

But such a proposition is too general and sweeping in its consequences to be readily admitted. It would exempt fede-

ral officers from all personal service to the state by which they are protected in person and property. These duties, between the citizen and the government, are not to be got rid of, but by pressing necessity, or by express enactment. They are inherent both in the general and the State government, and vital to their justice, order and support. They should, therefore, be permanent in their character, general in their application, and reciprocal in their obligation. We would therefore require proof, or conclusive argument, before admitting such a proposition for official exemption.

In contemplating our duties to the general and State governments, let us call to mind that the Federal and State Constitutions so constitute one context and series of a single governmental system, that we cannot expound the one without reference to both instruments. We have two Legislatures, each with its several and distinct subjects of legislation; so that neither can make a law binding that is beyond its strict constitutional limitations, while each is supreme within its own proper sphere of powers, as granted to the one, or restricted to the other. I therefore conclude that, whenever Congress shall have enacted that certain federal officers shall be exempt from specific civil duties, (as some are now exempt from ordinary militia duty,) such exemption might supercede a general Act of the State, or constitute an exception to its provisions, and the two enactments would be, thus, well reconciled.

But the general principle of exemption, bottomed on the comprehensive theory that such officers are always employed officially, would at once exempt them from all personal services to the State of which they are citizens. They might refuse to attend court, to give evidence, to serve as jurors, to meet the tax collector at the time appointed to receive returns of taxable property, and yet claim all the advantage and security of the State protection of person, character and property; which protection is the equivalent for the very services

which they would refuse to render. We cannot reconcile such incongruity.

In the case of *Ansley* v. *Timmons*, (3 M'C. R. 329,) the Court decided that even aliens are liable to perform militia duty; that it is in return for personal protection, and therefore no infraction of international law. And, upon the same principle, I would say, in the language of the dissenting opinion in *Harrington's* case, (2 M'C. R. 404; in which the first constructive exemption from road duty was allowed, and where the principles, of which a brief exposition is now made, were considered more at large;) "If the President of the United States were to claim the privilege of a total exemption from any general civil duty required of the citizens of the State where he resided, I would reply to him, first throw off the protection of your person and life, your property and character, afforded by the State government, and then you may be exempt. This is the tax laid on the person, to be paid in labor. If you cannot do the labor, the law admits of any reasonable excuse, to be judged of by the proper authority; but, having offered none, you must pay the fine, which is at once the substitute for your labor, and the price of your protection. Your office affords no privilege, and only binds you down more closely to obedience. You are still liable to be burdened according to the exigency of that local government which, in return for such services, holds an ægis over your person and property."

In the recent case of *Lieutenant Ingraham*, decided last February, (*supra*, p. 78,) this principle was adopted, and a naval officer, then on furlough, was held liable to serve as a juror. In my opinion that adjudication, which was unanimous, decides the present question. But, as its final decision may be thought to militate against the opinion of the Court in *Harrington's* case, (2 M'C. R. 400,) and in that of *The State* v. *Martindale*, (1 Bailey R. 163,) great consideration is due to these adjudications.

In the case against *Harrington*, three judges against two

decided that the clerk of a Court, in virtue of his office, was exempt from working on the roads. In that of *Martindale*, two judges, against one, in the late Court of Appeals, decided that a judge of the Federal Court was exempt from patrol duty.

In those cases, writs of prohibition were ordered, upon the ground that both the clerk and the judge, by reason of their continued employment in their offices, were legally exempt, not merely excused, from the personal duties required of them under the general enactments of our State laws, which, in terms, admitted of no exception of men within certain ages. Accordingly, in the decision of the case now before us, I felt that an apology was due for drawing a distinction between a post master and a clerk, or a judge. But I thought the possible distinction justified an effort to arrest the extension of such exclusive personal exemption from essential duties to the State, and I therefore refused the writ.

It may be regretted that the counsel did not deem it necessary to discuss the case upon doctrinal and constitutional grounds, to inquire whether the two former adjudications might not be wisely reconsidered upon arguments *ab convenienti*. The counsel merely referred to those cases as conclusive authority. The instance now before the Court, affords a striking illustration of the evil apprehended, at the trial of *Harrington's* case, of the growing nature of such personal privileges. By the last report of the Post Master General, there are, in the United States, more than thirteen thousand post-offices, or an average of five hundred to each State. If, then, Mr. Campbell be entitled to his prohibition, the five hundred post masters of this State, many of whom receive only three or four mails per week, would become exempt, *ipso facto*, with the decision in his favor. And this principle of official exemption, being once settled in favor of a few judges and clerks, and five hundred post masters, must, of course, be followed out in a long train of official exempts.

Law must be uniform in its operations; and judges cannot, like Caligula, make a consul of one favorite steed to be fed upon gilded oats, while they keep the rest of his fellows, close in harness, upon straw. There certainly are some offices, as that of President, or Governor, that, of themselves, imply a reasonable excuse; but the best standing excuse cannot amount to an official letter of exemption, so as to demand a writ of prohibition, as the right of entire classes, who can show no legislative warrant for the privilege claimed. As I hold, for myself, that the highly controverted decisions in *Martindale's* and *Harrington's* cases went upon mistaken principles, I have once more turned attention to the distinction between matter of excuse and the privilege of exemption. It is the proper ground of our present adjudication. "*Ex gratia*" and "*ex debito justitiæ*," are two things in law.

But, without assuming that the decision in the present case overturns those of *Harrington* and *Martindale*, the decision of the Circuit Judge, that the post master is not entitled to the writ of prohibition against the commissioners of roads, is unanimously affirmed.

EARLE, J. In Harrington's case, the ground of exemption was, that by the Act of 1789,[1] clerks of the Court were required to afford access to their offices at all times of the day from nine o'clock in the morning until four o'clock in the evening, Sundays excepted, and therefore the performance of this duty was incompatible with that of working on the roads; and, although the commissioners were authorized to ascertain and declare, when the same was not ascertained by law, or where doubts might arise concerning the same, what inhabitants were liable to work on any road, yet the exemption claimed was one ascertained by law, and the jurisdiction of the commissioners did not extend to the case of the relator. But the road laws, up to that time, had provided no special exemptions, and had only declared that the roads should be kept in

repair "at the equal charge and labor of all the male inhabitants from the age of sixteen to fifty years."

The Act of 1825, in exempting ministers of the gospel, millers and ferrymen, declares that no others shall be exempted from liability to work on roads and bridges. This enactment must be considered conclusive against the claim of exemption by any other class of persons, whether on the ground of office, or otherwise; and was probably adopted with reference to the various exemptions which might be claimed under the existing laws and judicial decisions. The duty of working on the roads is only a species of tax; a contribution which ought to be borne equally by all who live in the country, subject to its municipal regulations. And without the Act of 1825, it would seem as reasonable and as just that one holding a public office should claim to be exempt from paying an assessment for building or repairing a bridge. A default which arises from performing some other public duty, must be left, as matter of excuse, for the commissioners.

Without reference to the grounds of former decisions, I conclude, upon the construction of the Act of 1825, that the relator, Campbell, cannot be allowed the exemption which he claims, and that the prohibition was properly refused.

EVANS, BUTLER, and GANTT, JJ., concurred in this opinion.

[1] 9 Stat. 560. *An.* [2] 7 Stat. 255. *An.*

MARTIN & CORNWELL *v.* ALLEN KELLY.

SUM. PRO. brought in the mercantile name of a firm, without setting out the partnership or the Christian names of the partners, would have been bad upon exception by plea; but not on motion for nonsuit.

Before EARLE, J., at Laurens, Spring Term, 1840.

Sum. pro. The style of the process was, simply, "the

petition of Martin & Cornwell." The parties plaintiff were proved to be Drury Martin and William Cornwell, partners in trade.

Defendant moved for a nonsuit, because the plaintiffs' christian names were not set out, nor their partnership suggested. The motion was overruled, and the defendant now renewed it before the Court of Appeals, as well for the reason above stated as because the record in this case would not protect him from a second action on the same demand.

Curia, per EARLE, J. The exceptions taken to the process are that the christian names of the plaintiffs are omitted, and that they are not described as partners. We are all of opinion that the omission of the christian names is a defect which would have been fatal by plea; but that it cannot avail on a motion for nonsuit. In Comyn's Digest, (Title Abatement, E., 18,) it is so laid down:—"So he shall plead misnomer of the plaintiff, if his christian name be mistaken, or if his christian name be omitted." So, too, it was decided in the *Mayor and Burgesses of Stafford* v. *Bolton*, (1 B. & P., 44,) where a nonsuit for misnomer of the plaintiffs was set aside, because it should have been pleaded in abatement. (See 10 Rep., 122.) The precise question was decided here in *Chappell & Cureton* v. *Proctor*, (Harp., 49,) where the motion was for nonsuit, or in arrest of judgment, "because the declaration did not set out the plaintiffs' christian names, or that they were partners;" and the Court held that the objection came too late, unless in cases where the contract given in evidence varies, as to the name of the plaintiff, from the declaration. The other part of the exception was not noticed by the Court, and I conclude that it was regarded as depending on the same principle, being an omission of part of the description of the plaintiffs, which should have been pleaded, or was wholly immaterial. If the names of all the partners are properly set out, it cannot be necessary to add

that they are partners, trading under a particular name, or firm; except in cases of written contracts, in which they are designated by the name of the partnership firm; then it would be proper so to describe them, with an *alias dictus*, to avoid a variance. A contract with a partnership is only a joint contract, and it is enough to set out, in pleading, the names of all the parties, and to prove that the contract was made with all of them.

It is a mistake to suppose that this recovery would not be a bar to another action at the suit of the same plaintiffs, suing on the same demand as partners. In such case, I apprehend the record itself would furnish sufficient evidence of its being the same demand; and, if not, the deficiency might be supplied by other proof.

This is a summary process, and a notion seems to prevail, that less strictness is required, in pleading and practice, in the summary, than in the general jurisdiction. And perhaps cases may be found which lead that way.

Less strictness is requisite, perhaps, in setting out the demand, and also in pleading the defence. But the order of pleading must be observed; and, if the defendant, on the general issue, permits the plaintiff to go to trial, and to make out his case, he must be considered as waving those exceptions on the face of the process, for which he might have demurred, or pleaded in abatement, according to the rules which prevail in the general jurisdiction.

The motion for nonsuit is refused.

GANTT, RICHARDSON, EVANS and BUTLER, JJ., concurred.

Sullivan and *Campbell* for the motion.

See 10 Rich. 32; 4 Strob. 33; 2 Sp. 47; 2 McM. 51; Harp. 49. *An.*

SHUBAR & BUNTING *v.* B. H. WINDING.

A debtor inclosed notes, &c., to one of his creditors, by letter, with directions to satisfy first his own debt, then those of other creditors designated by name. This was a good assignment, as against other attaching creditors, for the benefit of the creditors named.

Before EARLE, J., at Edgefield, January Term, 1840.

This was an issue on the return of Matthew Gray, a garnishee, in whose hands certain assets, had been attached as the effects of Winding, the absent debtor. Mr. Gray claimed property in them for himself and other creditors to whom they had been assigned before the levy of the attachment. He relied on the following letter from Winding, which accompanied the notes and accounts when they were placed in his hands.

"The inclosed notes and accounts are all good; and out of them I wish you to pay yourself seventy-eight dollars, ($78.) Joseph Word about sixty dollars, (60.) The balance of Dr. Holland's account to Giddens and Bushnell; and the balance to F. M. Cooper. Gentlemen, it may take you a little time before you see these people, but I know it is good, and can do no better."

The Court held the assignment good to protect Gray, as a creditor in possession, but not to vest property in the other creditors; and ordered accordingly.

Upon an appeal being taken, his Honor, in the report of the case, expressed his conviction that his decision below had been erroneous.

Curia, per EARLE, J. It is only necessary to repeat what I have said in my report of this case; that I am satisfied the decision in the Court below was erroneous. We are all of opinion, that the letter, transmitting the securities to Mr. Gray, was a valid assignment of them to him and the other credi-

tors. There can be no doubt that such was the intention of the absent debtor, for the letter seems to be addressed to all of them, and was intended to give them a preference over others, as might be lawfully done; and in the only way in which it can well be done without suspicion of unfairness; that is, payment of money, or actual delivery of assets. After the receipt of the letter, the act was irrevocable on his part, and vested property in Gray for himself and, in trust, for the others. Indeed, after he had accepted the trust, and had acted upon it, by collecting the money, he assumed an agency for the others, which I think would raise an assumpsit, and enable them to maintain an action against him for money had and received. The case of *Dargan* v. *Richardson*,[1] decided this term, has held such a letter to be a valid assignment, to take effect from its date, and without delivery of the property. On the circuit, I considered Gray entitled to hold, as a creditor in possession, without reference to the effect of the letter, as an assignment. If good as an assignment to him, as it clearly was, according to *Dargan* v. *Richardson*, it was equally effectual to vest property in the other creditors, for whose benefit the securities were transmitted to him, as well as for his own.

The judgment of the Circuit Court, so far as regards the assets in the hands of Gray, over and above his own demand, is reversed; and the order will be reformed so as to secure the claims of the other creditors.

GANTT, RICHARDSON, EVANS and BUTLER, JJ., concurred.

[1] *Ante* 197, which see. *An.*

THE STATE v. JOHN CHAMBLYSS.

License to keep a tavern includes the privilege of retailing spirituous liquors.

Before O'NEALL, J., at Darlington, Spring Term, 1840.

Indictment for unlawfully retailing spirituous liquors. The facts were admitted, that defendant had retailed spirits in quantities less than three gallons; but that he was a tavern keeper, and had a license as such. The Court thought that, as a tavern keeper, he might furnish his guests with drink, as a part of their entertainment, and make his charge large enough to cover it; but that he could not sell spirits, as a separate business, even to his lodgers and guests. The jury, under these instructions, found the defendant *guilty*.

The defendant moved the Court of Appeals for a new trial, on the ground of error in the charge of the presiding Judge.

Curia, per EARLE, J. The ground assumed in the notice of appeal, asserts, in substance, that the defendant, under his tavern license, had a general right to sell spirits in small quantities to travellers, guests and other persons.

I will not stop to inquire whether he who abides an hour at a tavern is not as much a guest, as he who remains a day, or a week; nor whether there be any distinction between furnishing spirits to a guest, as a part of his entertainment, (and increasing the charge so as to cover the expense,) and furnishing it to him separate and distinct from any other entertainment. The view which we take of the subject renders such inquiries unnecessary and unprofitable.

What, then, is a tavern; and what are the rights which a license to keep a tavern confers, as to the vending of spirituous liquors? Johnson, in his dictionary says, "a tavern is a place where wine is sold and drinkers are entertained;" and Webster says, a tavern is "a house licensed to sell liquor in small quantities, to be drunk on the spot, and, in some of the

United States, it is synonymous with inn, or hotel, and denotes a house for the entertainment of travellers, as well as for the sale of liquors." Johnson, for his definition, gives Shakspeare's authority. It is clear from the writings of that poet, that such was the popular sense of the word in the time of Elizabeth, and Johnson's adoption of it shows that its meaning was unchanged when he published his dictionary, in the reign of George II. The popular sense in America, is clearly shown by Webster's definition.

It will not be questioned that if a word, having a clear and definite meaning in common parlance, be adopted into the law, it shall be construed according to its usual meaning, unless it appear by the lawgiver in a different sense. Let us, then, inquire whether the word tavern is used in our law in a different sense, or in a more restricted one, than its popular meaning as above stated. I begin by saying what will not be controverted, that, at common law, the vending of spirituous liquors was not a franchise, and therefore required no license; and, as a corollary to this proposition, that until the Stat. 5 and 6 Ed. VI., c. 25,[1] the vending of wines and other liquors was as lawful as the selling of meats or grain, or any other article of traffic. That it is within the power of the Legislature of this State to control, to regulate, and even to prohibit both the sale and the use of intoxicating drinks, it is not intended here to question. All that is meant to be asserted is, that prior to that statute, there was nothing in the law which laid any restraint upon such traffic, and that it may still be carried on in all cases and under all circumstances that are not in violation of that, or of the subsequent statutes passed upon the subject.

At a very early period of the history of man, houses were set up for the purpose of vending wines and other liquors. These had, originally, their appropriate names, as inns, taverns, ale houses, punch houses, victualling houses, porter houses, &c. I should infer, from what is said in Viner, (14

Vin. 439,) under the head of "Tavern," that the original employment of the keeper of a tavern was to sell wine alone; but, in process of time, these originally distinct employments became confounded. The seller of wines began to supply food and lodging for the wayfaring man; and hence, the word tavern, came to mean pretty much the same as inn, at a period certainly as far back as the days of Elizabeth. Be that as it may, in our Acts of the Legislature, the word inn has been mostly disused. It is to be found only in the Act of 1784,[2] where it is manifestly used as synonymous with tavern. In the subsequent legislation on this subject, all other descriptive terms are discontinued, and all who are required to take a license, are classed under the two heads of tavern keepers and retailers of spirituous liquors. I have gone through the legislation on the subject, in order to show that inns and taverns are synonymous, or nearly so; and I now proceed to show that all legislation upon the subject has proceeded on the ground that a tavern or an inn, was a house where, according to Johnson, "wine was sold and drinkers entertained."

The oldest legislation upon this subject, as I have before said, is the Stat. 5 and 6 Ed. VI., c. 25, by which the keepers of ale houses and tippling houses are prohibited from carrying on their business, unless permitted by the sessions, or by two justices, who are required to take recognizance against gaming, and for good order. The Stat. 1 Jac. I., c. 19, recites "that the ancient true and principal use of inns, ale houses, and victualling houses, was for the receipt, relief, and lodging of wayfaring people, travelling from place to place," and not "meant for harboring lewd and idle persons," to "spend and consume their money and time in a lewd and idle manner." This statute, following up the preamble, prohibits the inhabitants of the place where such houses are situated, from resorting to, or "haunting" them, as it is expressed. The stat. 4 J., 1, c. 5,[3] for repressing "the odious and loathsome

vice of drunkenness," is to the same effect. The stat. 1 Car. 1, c. 4,[2] prohibits the keeping of inns, ale and victualling houses, from suffering any one to tipple in their houses; and the second clause extends the previous acts of James I. to keepers of taverns and such as sell wines and keep wine and victuals in their houses. It is obvious, from the reading of these statutes, that an inn keeper was one whose business consisted, in part, in vending spirituous liquors, as well to the inhabitants of this town, or village, as to the traveller and wayfaring man; and although the stat. 1 Jac., 1, c. 19, recites that the ancient and true principal business of inns and ale houses was for "the receipt, relief, and lodging of wayfaring people," yet it is obvious, from the Act itself, that, at that time, a part at least, if not the "principal" part of their business, was to supply the traveller, as well as the inhabitants of their town, with the means of "spending their money and time in idleness and drunkenness."

The first statute passed upon this subject, after the settlement of Carolina, was in 1694,[4] (2 Stat. So. Ca., 85.) It recites that the "unlimited number of *taverns*, tapp houses and punch houses, and the want of sobriety, honesty, and discretion, in the owners and masters of such houses, have and will encourage all such vices as usually are the productions of drunkenness." It then goes on to enact that no person "shall sell any wine, sider, beere, brandy, rum, punch, or any strong drink under the quantity of three gallons, until he shall have obtained a license," &c. In the next year, the same, in almost the precise words, was re-enacted, (*id.* 113,) with an additional clause fixing the price at which wines and other liquors should be sold. It was again re-enacted in 1703, (*id.* 198,) and 1709, (*id.* 336,) and made perpetual in 1711, (*id.* 362.) This closes the legislation of the Lords Proprietors. One general remark applies to all these statutes. They declare it unlawful to sell wines and other liquors without; but leave it, as it was before, lawful to sell them with a license.

The inference is clear and unquestionable, that a tavern was then understood, by the lawmakers, to be a place where wines and other liquors were sold. The only legislation of the regal government are the Acts of 1740 and '41–2.[5] By the first, every keeper of a "tavern" or punch house is prohibited from giving or selling any spirituous liquors to a slave. The Act of 1741-2,[6] requires the justices of the peace to meet in their respective parishes twice a year, to inquire into the qualifications of "such persons as shall desire licenses to retail strong liquors," and to grant certificates, or orders to the public treasurer for granting licenses as aforesaid."

The next clause prohibits the public treasurer or receiver from granting licences to sell spirituous liquors or strong drink, or to keep a billiard table without an order for that purpose, signed and subscribed by the justices so assembled, and being and residing in the parish where the person or persons so licensed shall or propose to keep a *tavern* or punch house, or billiard table." By another clause of the same Act, the street, land, alley, road, bridge, ferry, village, town, or other place, where the "tavern," or punch house, or billiard table is to be kept, shall be particularly mentioned and specified, both in the order and the license. Can there be a doubt, that, in these statutes, taverns are spoken of as places where "strong drink" and "spirituous liquors" are sold?

The first Act on this subject, after the revolution, is that of 1784.[7] It provides that, (except in the parishes of St. Philips and St. Michaels,) "two or more magistrates for the respective districts of this State shall be authorized and empowered, on every Easter Monday, and the first Monday in August, to grant certificates to any person or persons in their respective districts, who may apply for the same, if, in their judgments, they shall think such person or persons fit and qualified to keep a *tavern*, inn, ordinary, punch, ale house, or billiard table, or to retail strong liquors as aforesaid; and the person or persons to whom such certificate shall be by them

granted, shall produce the same to the clerk of the Court of the district in which he or she shall reside;" and the clerk is required "to grant a license under his hand and seal, agreeable to the purport of the said certificate, to such person or persons, who are to pay the clerk one dollar for his trouble, and also the sum of three pounds for every license to retail liquors, and the sum of fifty pounds for every license to keep a billiard table." On this statute, I would observe that the certificate is to be, that the applicant is a fit and proper person to keep a tavern, inn, ordinary, punch, ale-house, or billiard table, or to retail strong liquors, and the license is to be agreeable to the purport of the certificate; so that he who applies to keep a tavern, shall have a license for that purpose, and so of the rest. But, in the subsequent part, where the amount to be paid is fixed, all these various licenses are included under two classes: viz., to retail strong liquors, and to keep a billiard table. Now this must mean that the keepers of taverns, inns and ordinaries are to pay nothing for their licenses, or that they are included in the general "license to retail strong liquors." The latter it seems to me, is the obvious meaning, and is in conformity with the previous legislation on the subject. The Court Act,[8] (1 Brev. Dig. 418,) gives to the justices of that Court power to grant licenses to keep taverns and public houses, and the justices are required to cause a fair rate of meat, drink and lodging and provender for horses to be made and ascertained, and the tavern keeper is required to affix the same in the most conspicuous part of his most public room, for the inspection of "*all persons calling at the said tavern.*" He is also required to give bond to keep clean and wholesome meat, drink and lodging for travellers, and the usual provender for horses. The Act of 1788[9] extends the jurisdiction of the county Court, over taverns, to all persons who shall retail any brandy, rum, &c. Here, for the first time, those who are required to take out licenses are divided into two general classes: 1, those who keep taverns,

and, 2, those who retail any wine, rum, brandy, &c. The Act of 1789[10] makes no alteration in the existing law, except to authorize the county Court to grant licenses at any Court held in the year.

On the abolition of the county Courts, their power was transferred to the commissioners of roads.[11] By the Act of 1801,[12] (1 Brev. Dig. 420,) they are required at any stated meeting, to hear all applications for licenses to keep *taverns* and retail spirituous liquors, and are authorized to reject such application, or grant such license, as to them shall seem proper. Every retailer of spirituous liquor shall give bond according to law, and every person who shall obtain a tavern license, shall give bond with security, to keep clean and wholesome meat, drink and lodging for travellers, &c. In another clause, it is said that "all licensed retailers who do not keep, also, taverns and entertainment for travellers, shall pay fifteen dollars for their license, and shall not retail less than one quart." To me, the obvious meaning of this is, that there are two classes of retailers, one who do not keep taverns and entertainment, and another who do keep taverns, and are required by law to give bond and security to keep clean and wholesome meat, drink, &c.; for the words "all licensed retailers who do *not* keep taverns," imply that there are other licensed retailers who do. The first class is limited to the sale of one quart; the other, left unrestrained in quantity, as all retailers had been before that time.

From a careful review of all these statutes, I think the conclusion is, that a "tavern is a house licensed to sell liquors in small quantities, to be drunk on the spot," and "denotes a house for the entertainment of travellers, as well as for the sale of liquors." This is the American sense in which the word is used, according to Webster; and, in looking into 2 Kent Comm. 595, it will be found that the distinction between tavern keepers and retailers of spirituous liquors, as is herein stated, is in conformity with the laws of New York, and of most of the States of the Union.

I have before said that, independently of the statutes which have been passed on the subject, a man might lawfully set up an inn, tavern, or ale-house, without a license. That is distinctly stated in 1 Burn's Justice, 22, and 14 Vin. Ab. 436; and I think it is very clear, both from the English Statutes made of force, and from our own, that the sole object of bringing these establishments under the supervision of the civil authority, was to limit and repress, as far as practicable, the evils resulting from the use of intoxicating liquors. I do not understand that a boarding house, such as is found in any town or village, or that the houses on all the great highways, where travellers are entertained with meat, drink and lodging, are required to be licensed. (12 Mod. 254.) These are, in some senses, inns and taverns, and the owners are entitled to some of the privileges, and subject to some of the liabilities, of such employment; but they are not the kind of inns and taverns that come within the spirit and purview of the license law. Such, I believe to have been the universal understanding of the law upon this subject; and, in no instance that I have known, or heard of, has a license been taken out for any house of entertainment, except those in which wines and liquors were sold independent of, and unconnected with eating and lodging. The construction here put on our license law is in perfect consistency with the Act of 1816,[13] "the more effectually to prevent the pernicious practice of gaming," and the Act of 1835,[14] to "amend the law in relation to granting licenses to retail spirituous liquors;" and so far as I can learn, it has been the uniform construction of the boards of commissioners of roads. They have always granted but two kinds of licenses, one called a retailer's, and the other, a tavern license. Until within a few years, the commissioners generally granted tavern licenses to every shop keeper who would give the bond required by law, to keep clean and wholesome meat, drink and lodging for travellers; and this pernicious practice, in some of the districts, is continued up

to this time, although there is no pretence that such persons keep a tavern in the proper sense of the term.

From what has been already said, we may fairly infer, 1, that to keep a house for the entertainment of travellers, or boarders, requires no license; 2, that if, to such entertainment, be added the vending of spirits in small quantities, as is usually done at the bar of a tavern, then a license is necessary; 3, that a licensed retailer, who does not keep a tavern, cannot sell under a quart; and, 4, that tavern licenses are as much under the control of the commissioners of roads as the licenses to retail.

Contrary to my usual habit, have gone into much detail in the examination of this case. I have done so, not because there is any intrinsic difficulty in the subject, but because of the deep and exciting interest of the questions supposed to be connected with it. As a judge, it is my duty to expound, not to make, the law, *dicere et non facere legem;* but, on this occasion, I have the consolation to know that there is nothing new in this opinion, nor any thing which will interfere with that great reformation in the habits of our people, which has already taken place.

It is the opinion of this Court, that there was error in the charge of the Circuit Court, and a new trial is, therefore, ordered.

RICHARDSON, EARLE and BUTLER, JJ., concurred.

O'NEALL, J., in a case turning on the same point, delivered the following elaborate judgment, which may be appropriately regarded as his Honor's dissenting opinion.

[1] P. L. Appendix, No. 2, p. 24—not in the statute at large, nor expressly made of force in 1712. *An.*

[2] 4 Stat. 608, § 2, 3. *An.*

[3] P. L. Appendix, p. 25, 27. *An.*

[4] Earlier Acts have been lost. See 10 Rich. 130; 2 Stat. p. v., Nos. 2, 18, in titles of Acts. *An.*

[5] 7 Stat. 408, § 32. *An.*

[6] 3 Stat. 581. *An.*

[7] 4 Stat. 607. *An.*

[8] 7 Stat. 236, § 53-4. *An.*

[9] 7 Stat. 248, § 5. *An.*

[10] 7 Stat. 260, § 8. *An.*

[11] 7 Stat. 299, § 35. *An.*

[12] 5 Stat. 399. *An.*

[13] 6 Stat. 26. *An.*

[14] 6 Stat. 528. *An.*

"COMMISSIONERS OF ROADS *v.* JAMES H. DENNIS.

"Summary Process. Sumter, Spring Term, 1840.

"O'NEALL, J. The defendant obtained a license to keep a tavern. The commissioners, supposing they were entitled to demand fifty dollars for such license, as including a license to retail, have brought this process to recover it.

"I have given the subject as deliberate a consideration as my situation will permit; and, notwithstanding the great respect which I have for the legal judgment of those who entertain the opinion that a license to keep a tavern includes a license to retail, I am constrained to say that I regard the tavern license and the license to retail, as two distinct things.

"The oldest law to which I have had reference, is that of 5 and 6 Ed. VI., c, 25, (App. P. L. 24,) which, as its title purports, was 'for keepers of ale houses and tippling houses, to be bound by recognizance.' After reciting the grievance, (which, unfortunately, still exists,) that 'intolerable hurts and troubles to the commonwealth of this realm doth daily grow and increase through *such abuses and disorders* as are had and used in common ale houses, and other houses called tippling houses,' this law enacted that the justices of the peace shall have 'full power and authority to remove, discharge and put away common selling of ale and beer in the said common ale houses and tippling houses, *when they shall think meet and convenient.*' It then provides that no one shall be allowed to keep such houses, except such as shall be admitted in the sessions, or by two justices of the peace, whereof one shall be of the quorum, who are directed to take bond and security by recognizance, against gaming, and for the maintenance of good order. This Act, passed by the British Parliament in 1522, is the fountain from which is derived the power of the commissioners of roads to grant licenses to retail. It may be remarked that its provisions are wholly applicable to ale

houses and tippling houses, which are but other names for our retail shops, now commonly called groggeries. Nothing is said about a tavern. In this Act, too, it will be remarked that the justices have, explicitly, the power to remove, discharge and put away the common selling of ale and beer in the said common ale houses, when they shall think meet and convenient. This power, on examining the subsequent legislation, extended to every species of retailing, appears to be continued to the commissioners of roads.

"The Stat. 1 J. I., c. 9, (App. P. L. 25,) to restrain 'the inordinate haunting and tippling in inns, ale houses and other victualling houses,' makes no mention of, or provision for tippling houses, provided for in 5 and 6 Ed. VI., c. 25. The recitation of the preamble of that statute, gives the true notion of the places which it purports to regulate, and shows that retailing does not appropriately belong to them. It states that 'the ancient, true and principal use of inns, ale houses and victualling houses, was for the receipt, relief and lodging of wayfaring people, travelling from place to place, and for such supply of such people as are not able to buy greater quantities, to make their provision of victuals, and *not meant for entertainment and harboring of lewd and idle people, to spend and to consume their money and time in lewd and drunken manner.*' The latter clause of the recitation, denying that ale houses and victualling houses were intended to be devoted to drunken purposes, is a most graphic description of the proper use of a retail shop at the present day.

"The Stat. 4 J. I., c. 5, (1 App. P. L. 25,) 'for repressing *the odious and loathsome sin of drunkenness*,' relates to inns, victualling houses, or ale houses. The same may be remarked of Stat. 2 J. I., c. 7, and Stat. 1 C. I., c. 4. These statutes clearly show that an inn, which is now commonly called a tavern, was, in the understanding of our ancient lawgivers, a very different thing from a modern retail shop.

"The Act of 1784,[1] (P. L. 340,) empowered (outside

of St. Philip's and St. Michael's) any two or more magistrates, for the respective districts of the State, to grant certificates to any person or persons who may apply for the same, if in their judgment they shall think such person or persons 'fit and qualified to keep a tavern, inn, ordinary, punch, ale house or billiard table, *or to retail strong liquors.*' A certificate for one of the different establishments here described, would not, *ex vi termini*, included another. For example; a certificate to keep a tavern would not authorize the keeping of a billiard table. I should think, on the plain words of the Act, that a certificate to keep a tavern would not authorize the retailing of strong liquors; for this last is separated from the former, not only by one, but by two disjunctive conjunctions, showing that it was not regarded as indentical with any of the other matters provided for. It is true, the same sum was to be paid for each; but, surely, the legislature were competent to make a distinction in this behalf whenever afterwards they thought proper so to do.

"The county Court Act of 1785,[2] (P. L. 384,) gave to the justices of the county Court the power to hear 'in open Court all applications for licenses to keep taverns, or public houses, within their respective counties, and *to reject* such application, or grant such license, for one year, *as to them shall seem meet.*' In this Act, the use of the word 'public houses' might give great plausibility to the idea that a tavern license was a license to retail, were it not for the Act of 1788,[3] (P. L. 454,) which shows that it was not supposed that the county Courts had, by the Act of '85, power to grant licenses to retail. It is therein provided, that the 'authority and superintendence of the county Courts over taverns and tavern keepers, shall extend to all persons who shall retail, within the jurisdiction of any county Court, any wine, brandy, rum, gin, beer, cider, punch, or other spirituous liquors or strong drink, in quantities less than three gallons.' That Act probably made a tavern license equivalent to a license to retail; but it

shows, nevertheless, that they had, before, been distinct. The Act of 1791,[4] (1 Faust, 50,) however, again separated them; for it provided that the county Courts should have power to grant licenses for retailing of spirituous liquors or keeping of taverns."

"The Act of 1799,[5] (2 Faust, 325,) standing by itself, might show that a tavern license would include a retailer's license; for it gives the commissioners of roads 'full power and authority to order licenses to be granted to proper persons to keep taverns and retail spirituous liquors.' But this Act, when read in connection with the Act of 1791, must, notwithstanding the loose wording of it, be held to mean no more than that the commissioners of roads should have the power, heretofore belonging to the county Courts, of granting licenses to tavern keepers, and to retailers.

"The Act of 1825,[6] (p. 57,) which was a collection of all the laws in relation to the powers and duties of the commissioners of roads, of force in the State, and a re-enactment of the same, provided that 'the sole and exclusive power of granting licenses to retailers of spirituous liquors, tavern keepers, and keepers of billiard tables, shall be, and the same is hereby, vested in the commissioners of roads.' In this Act, it is plain that three classes to be licensed are contemplated; 1, retailers, 2, tavern keepers, and 3, keepers of billiard tables. It is plain that a license for one would not be a license for all these pursuits.

"The Act of 1835,[7] (p. 75,) has entirely separated retailing from the keeping of a tavern; for it is, by it, made a subject of distinct legislation, and the retailer is subjected, by name, to restrictions and conditions which do not apply to tavern keepers. The price of a license to retail spirituous liquors is fixed at fifty dollars; but no provision is made for a tavern keeper's license to be charged, either in its nature, or in the price to be paid for it. It must, therefore, stand as it did before.

"The decree must be for the defendant."

GANTT, J. I concur with the presiding judge, O'NEALL, in the views taken of the law as expressed in his report, and I trust that the Legislature will soon interpose its high authority to do away the impolitic and mischievous amalgamation; that travellers may rest in quiet and peace at those houses, founded on principles of public expediency; which will not be the case, if riot and disorder is permitted to prevail.

[1] 4 Stat, 609. *An.* [2] 7 Stat. 236. *An.* [3] 7 Stat. 248. *An.* [4] 7 Stat. 268. *An.* [5] 7 Stat. 299. *An.* [6] 9 Stat. 564, § 23. *An.* [7] 6 Stat. 528. *An.*
See Act of 1849, 11 Stat. 557; 7 Rich. 518. *An.*

COZENS AND BROTHERS *v.* DANIEL HOUSE.

On the joint and several note of a man and his wife, a writ was issued against both, as separate persons. It seems that the declaration against husband alone, suggesting the relation of the parties, would have been good; but, for want of such suggestion, it was bad on special demurrer.

Quære, whether on special demurrer, such variance would defeat the action, or, only put the plaintiff to amend.

Such variance is not the subject of a motion for nonsuit after plea; for the plea has denied the declaration without reference to the writ.

Before BUTLER, J., at Columbia, March, Extra Term, 1840.

Action on a joint and several note made by the defendant and his wife. The writ was against both; the declaration, against the husband alone. Defendant moved for a nonsuit, which was overruled; and plaintiff took judgment against the husband.

Defendant renewed his motion in the Court of Appeals, on the ground that the plaintiff had sued on a joint contract, whereas the note offered in evidence was the separate note of Daniel House; the signature of the wife being a nullity.

Curia, per BUTLER, J. By our law, according to approved decisions, the writ may be referred to as part of the record, and hence, the declaration should conform to and be consist-

ent with it. A material variance between them would be fatal to the action. As a general rule, the declaration should retain the names and the relation of the parties, as they are stated in the writ. But there are cases where the name of a party may be dropped from the declaration, that had been included in the writ; as in *Caldwell* v. *Harp*, (2 M'C. R. 275,[1]) where the plaintiff had brought an action against two, on a joint and several demand, and had declared against one. By looking at the writ it appeared that but one of the parties had ben served, so that but one, in fact, was sued. In such case, it was held that the plaintiff might discontinue as to one and proceed against the other, without making different parts of the record inconsistent. If it had appeared in the case under consideration, either by the writ, or by suggestion in the declaration, that the defendants were husband and wife, the declaration against the husband alone would have been good; because the record would have explained itself. This, however, does not appear, and there is a departure, in the declaration, from the writ.

It is unnecessary for us to say what would have been the precise legal effect of the variance, if it had been properly taken advantage of. There is no doubt that advantage of it could have been taken by special demurrer. *Young* v. *Gray*, (1 M'C. R. 211.) This might not have defeated the action; but only have arrested it, so as to enable the plaintiff to amend his proceedings. We think the defendant was properly denied the right of excepting to the defect, on a motion for a nonsuit, after having pleaded to the declaration; for the plea denied the defendant's liability according to the allegations of the declaration, without reference to the writ.

Motion dismissed; GANTT, EVANS and EARLE, JJ., concurring.

De Saussure, for the motion; *Black* and *Arthur*, contra.

[1] See ante, 185; 3 Strob. 282. *An.*
See 2 McM. 346. *An.*

THE STATE, ex rel. James R. Lark, et al., *v.* J. R. CURETON.

A Justice of the Peace has no authority to issue a writ of *capias ad satisfaciendum*.

Refore RICHARDSON, J., at Lancaster.

A justice of the peace had issued a writ of *capias ad satisfaciendum*, on a judgment awarded by himself; and the Judge below granted a prohibition to restrain the execution. The plaintiff moved the Court of Appeals to reverse that decision.

Curia, per EARLE, J. The office of justice of the peace was unknown to the common law. It was created in England by statute, and the appointment is by the King's commission, which defines the extent of his power and authority. The duties of the office were mainly ministerial, and related to the preservation of the peace and the prosecution of offenders. Recent statutes, there, have enlarged the jurisdiction to many classes of cases foreign to the original institution. Here, the office, at an early period, underwent a more important change; and, from being ministerial, became judicial also, to a much greater extent than in England. The first Act for the trial of small and mean causes, was passed in 1686,[1] giving jurisdiction to a justice of the peace, to the amount of forty shillings. Similar Acts were passed in 1687, 1690 and 1692,[2] all limited in their duration to short periods. This last was several times continued, and, finally, made perpetual by the Act of 1712.[3] This Act of 1692, authorized the justice, after hearing the parties and their witnesses, to adjudge and determine according to justice and equity, to cause execution to be levied of the goods and chattels of the defendant, and, for want of these, to take the body. But the Act of 1747,[4] which repealed all previous Acts for the trial of small and mean causes, at the same time that it enlarged the jurisdiction of a justice to all cases where the debt or damages do not exceed twenty pounds current money, and rendered it

exclusively within that amount, gave him only the power of awarding execution against the goods and chattels; and the fifth section provides expressly that "no writ of *capias ad satisfaciendum*, or execution against the body of the defendant, shall be hereafter issued out of any Court in this Province, for any debt or damages under twenty pounds current money, debts due to his Majesty excepted."[5] The subsequent Acts, enlarging the jurisdiction of justices, first to three pounds, then to five pounds, then limiting it to twenty dollars, relate to the trial, and not to the mode of enforcing judgment. Indeed the Act of 1799[6] limits the jurisdiction to twenty dollars, "to be recovered by the same proceedings as have heretofore been used, on the trial of causes small and mean;" and the mode of proceeding under the Act of 1747, had been an execution against the goods only. The Act of 1824[7] has no other effect than to render the jurisdiction exclusive to that amount. The Act of 1747 still regulates all trials before justices for the recovery of demands within their jurisdiction; and, by that, they have no power to award execution against the body.

The motion is refused.

GANTT, RICHARDSON, EVANS and BUTLER, JJ., concurred.

Williams, for the motion.

[1] 2 Stat. 27. *An.* [2] 2 Stat. 34, 47, 74. *An.* [3] 2 Stat. 598. *An.*
[4] P. L. 214; not in statute at large. See 4 Rich. 553, note. *An.*
[5] See 1 Brev. R. 45, note. *An.* [6] 7 Stat. 296, § 16. *An.* [7] 6 Stat. 234, § 2. *An.* See 2 Rich. 53. Act of 1839, 11 Stat. 17, § 15. *An.*

FRANCINA PRATHER *v.* ROBERT OWENS.

"Unto and into a certain highway which runs near where the said plaintiff resides," is a sufficient description of the *terminus ad quem* in a declaration in case for obstruction of a private way; at any rate it is good after verdict.

In an action on the case for obstruction of a private way, a verdict of damages for the plaintiff, determines the right of way as against the defendant, and is conclusive evidence of it in a subsequent action between the same parties.

Before EARLE, J., at Laurens, Spring Term, 1840.

Action on the case for obstructing a private way. Plea, not guilty.

The plaintiff had had a verdict against the defendant in a previous action, for the same obstruction, with five dollars damages; and, in a second action, had taken a similar verdict by consent. The obstruction not being yet removed, this third suit was brought; the witnesses to establish the right and the infringement of it being the same as in the former cases.

The Court held that the former verdict was conclusive of the right, and the only questions were the continuance of the obstruction and the amount of damage. The jury, so instructed, found for the plaintiff one hundred and fifty dollars.

The defendant moved the Court of Appeals for a new trial, for error in the charge of the circuit judge; and in arrest of judgment, because the verdict did not specify the way to which the defendant was entitled, and because it was not set out with sufficient certainty in the declaration.

Curia, per EARLE, J. The plaintiff declares upon her possession, and claims a right of way from her plantation "into, through and over the plantation and close adjoining thereto, now in the possession of the defendant, unto and into a certain highway, which runs near where the said plaintiff resides." It is suggested, in arrest of judgment, that the way is not set out with sufficient certainty. It is true that the *termini* of a way should be set out with reasonable certainty; and a majority of the Court are of opinion that "unto and into a certain highway which runs near the residence of the plaintiff," is a sufficient description of the *terminus ad quem*. The precedent is taken from 2 Chitty Plead., 351, (p. 809 of Ed. 1837,) where the description is, "unto and into a

certain common and public highway in the county aforesaid," and refers to *Blockley* v. *Slater*, (1 Lutw., 119;) and it is added, in note *t*, the *terminus ad quem* may be laid to be a public highway, and will be proved by evidence of a public footway." In *Allen* v. *Ormond*, (8 East. R., 4,) the way claimed was from the plaintiff's gardens "unto, into, over and across the close called Crannels, unto and into a certain public King's highway, in the parish aforesaid;" and it was objected, that the *terminus ad quem* being a public highway, must be taken to be a highway for all purposes, and was not proved by evidence of a common footway. But the objection was overruled, and the plaintiff had a verdict, which was sustained, because it was a public highway for foot passengers; though the Court expressed a doubt, whether the description might not have been bad on special demurrer, as not pointing out with sufficient certainty what sort of highway was meant; that is, whether for carriages, for persons on horseback, or for foot passengers. It was not made a question whether the *termini* of the highway should be described, (as into a certain highway leading from such a place to such a place,) as it is argued here. *We* have, strictly speaking, but one kind of public highway, which is a highway for all purposes, and, in pleading, must be so intended. The doubt expressed by the Court, in *Allen* v. *Ormond*, would not apply to cases arising here.

We are all of opinion that any error in omitting the *termini* of the way claimed, is cured by verdict. It was so held in *Clarke* v. *Cheney*, (1 Ventr. 13.)

It is objected that the verdict does not specify the way to which the plaintiff is entitled. The verdict is in the only form in which a verdict can be rendered, a verdict for damages, which establishes the plaintiff's right to the way described in the declaration. The jury could not render a verdict which should have the effect of putting the plaintiff in possession of the way, as in ejectment, or trespass to try title;

for it is an incorporeal right, an easement over the land of another, and the plaintiff could only recover damages for the obstruction, which he may continue to recover as long as the obstruction remains.

On the grounds taken for a new trial, the Court are of opinion, that there was no error in the instruction to the jury. There is certainly a difference made, in some leading cases, between the effect of a former recovery when pleaded, and when given in evidence. But all these cases have arisen upon the effect of a former recovery when offered by the defendant; and it is said that the plaintiff shall not be estopped, unless the former recovery be specially pleaded. If the defendant, on the general issue, put the plaintiff upon proof of his case, and use the record of former recovery only as evidence, the jury shall not be precluded from saying that the plaintiff had a cause of action, notwithstanding. (*Outram* v. *Morewood*, 3 East. R. 345; *Vooght* v. *Winch*, 2 B. & A. 662.) In the *Duchess of Kingston's* case, Ch. J. De Grey, in delivering his judgment, holds the following language: "From a variety of cases, relative to judgments being given in evidence in civil suits, it seems to follow, as generally true, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea in bar, or as evidence, conclusive between the same parties, upon the same matter directly in question in another Court." If this be true, it is impossible to imagine a reason why a judgment rendered in the same Court should not be equally conclusive. In *assumpsit*, a former recovery may be either pleaded in bar, or given in evidence; and there seems to be no good reason why, in one case, it should be absolutely conclusive, as a bar, or an estoppel, and, in the other, should only be persuading evidence, as it is called. A record of conviction against a parish, for not repairing, is conclusive evidence, on a subsequent indictment against the same parish, of the liability of the parish to repair. (Peake's Cases, 219.) In an action for

mesne profits, the judgment in ejectment is conclusive against the defendant, on the right of possession at the time of the demise. (6 Bac. Ab. 666.) From these cases, it would seem to be entirely in conformity with the principle on which they have been decided, that the former verdicts for the plaintiff against the defendant, for an obstruction to the same way, should be regarded as conclusive evidence of the right of the plaintiff to the way in question. In this action, it was impossible for him to plead the former recovery as an estoppel; he could only set out the way and the obstruction. The recovery was not conclusive on all the points made on the new issue; for the continuance of the obstruction was a fact to be made out by additional proof, and he used the former record in the only way in which he could use it, as evidence of his right. The old maxim, that no man shall be twice vexed by the agitation of the same question, would seem to be of very little authority, if, after two verdicts on the same right, in dispute with the same adversary, supported by the same proof, out of the mouths of the same witnesses, the plaintiff should be told that the verdicts have concluded nothing, and that the right is still an open question. The case of *Street* v. *Bovingdon, et al.*, (5 Esp. 56,) is directly in point. It was twice tried before Lord Ellenborough, who decided *Outram* v. *Morewood*, and occurred immediately after that case. It was an action on the case against the defendants, for erecting weirs and other obstructions in a certain river, and thereby directing the water from the plaintiff's mills. The plaintiff offered in evidence the record of a former action against Bovingdon alone, for similar wrongs, in which he had relied on the same rights which he claimed in the subsequent action, and had obtained a verdict. The plaintiff's counsel contended that the verdict was conclusive of the plaintiff's right; which was resisted by the other side. Lord Ellenborough said, "the record of the former case could not be deemed a legal estoppel; but it was binding so far, that he should think

himself bound to tell the jury to consider it conclusive of the rights of the parties." Upon which the defendant's counsel, Best, *serjeant* and Espinasse, acquiesced, consented to a verdict for the plaintiff, and agreed to remove the obstructions. The defendant, here, offered the same proof, by the same witnesses, to resist the plaintiff's right, as on the former trial; and the jury were properly instructed that, as matter of evidence, the former verdicts ought to be considered as conclusive of the right of the plaintiff; leaving the other questions to depend on the additional proof.

Motions dismissed; GANTT, RICHARDSON, EVANS and BUTLER, JJ., concurring.

Irby, for the motion; *Young*, contra.

See 2 N. & McC. 363, note about costs. *An.*

WILLIAM CAVAN and others *v.* ROBERT W. DUNLAP.

Application for relief under the Prison Bounds Act, being resisted on the grounds that defendant's schedule was false, and that an assignment (mentioned in the schedule) of part of his effects, was false and fraudulent; the jury found the *assignment* false and fraudulent. *Held*, that this was not such conviction of rendering a *false schedule*, as thereafter to exclude the defendant from the benefit of that Act and the Insolvent Debtors' Act.

But the defendant was not entitled to his discharge until that action, in which the verdict of fraudulent assignment had been found, was satisfied.

Three months advertisement in a newspaper was sufficient notice, to suing creditors generally, of an application for the benefit of the Insolvent Debtors' Act.

One of the plaintiffs, a suing creditor, resisting the application for the benefit of the Prison Bounds Act, was not a competent witness for the other plaintiffs to prove that the defendant's schedule was false.

Before O'NEALL, J., at Camden, Spring Term, 1840.

In this case the defendant had applied for the benefit of the Insolvent Debtors' Act. The plaintiffs, suing creditors, filed their suggestion, objecting to the defendant's discharge,

and setting out for cause, amongst other things, that the defendant, in confinement at a former suit of N. B. Arrants, (one of the present plaintiffs,) had, on application for the benefit of the Prison Bounds Act, been convicted of having rendered a false and fradulent schedule, and that he thereby forfeited his right to relief under the Insolvent Debtor's Act.

The facts were, that the defendant's application, at the suit of Arrants, had been resisted on the grounds that his schedule was false, and an assignment of part of his effects to one James S. Dunlap, fraudulent. The articles assigned were contained in the schedule, and specifically designated, with a memorandum of the assignment at the foot. On the issue then presented, the verdict was, "We find the assignment false and fraudulent, and should be void."*

The plaintiffs, in the present case, contended that the defendant was brought, by this verdict, within the disability created by section ten of the Prison Bounds Act,[1] (P. L. 456,) viz. "that any person who shall deliver in *a false schedule* of his effects, shall suffer the penalties of wilful perjury, shall be liable to be arrested again for the action, or execution on which he was discharged, and shall be forever disabled to take any benefit from this Act, and from the Act for the more effectual relief of Insolvent Debtors, passed the seventh day of April, 1759." But the Court held that the verdict, only finding the *assignment* false and fraudulent, did not subject the defendant to the penalty attached to the rendering of a false schedule.

After the case had been partially heard, it was objected by the plaintiffs, that Levy & Hughson and Farrar & Robinson, suing creditors, had had no notice of defendant's application.[2] (P. L. 247.) It appeared that a notice had been published for three months, in the Camden Journal, for the plaintiffs

* In the report of *Arrants* v. *Dunlap*, (*supra*. p. 27,) it is inaccurately stated that the jury found the *schedule* false and fraudulent. The error, however, was not material to the issue there involved.—R.

named, *and all other suing creditors*, to appear at the Court of Common Pleas, to be holden for Kershaw district, on the fourth Monday in March next, to show cause, if any they can, why the prisoner [the defendant] should not be discharged under the Insolvent Debtors' Act. The Court decided that this notice was sufficient.

To prove the defendant's schedule false, William Cavan, one of the plaintiffs in this suggestion, (and one at whose suit the defendant was confined,) was offered as a witness. But the Court excluded him as incompetent, both because he was a party on the record, and because, as a suing creditor, he was directly interested in the event of this issue.

On the other objections, the jury found for the defendant, and he was discharged on taking the oath and making the assignment required by law.

The plaintiffs moved to set aside the verdict and order for the discharge of the defendant, and to grant a new trial, on the following grounds:

1. That, by the verdict, at the suit of Arrants, the defendant stood convicted of rendering a false schedule, and was thereby excluded from any benefit from his present application.

2. That the defendant was not entitled to any benefit under the Insolvent Debtors' Act, so far as respects the case of N. B. Arrants against him, inasmuch as that case was *res adjudicata*.

3. That no legal notice had been given to Levy & Hughson, and to Farrar & Robinson.

4. That the evidence of William Cavan had been improperly excluded.

Curia, per EARLE, J. The principal question which we have to decide, arises out of the first ground of the defendant's motion, and depends on the construction of the verdict rendered by the jury on the first issue. If we are to construe

the verdict according to the meaning and intention of the jury, (if there be anything equivocal in its terms,) we must see what questions they were called on to decide. Every verdict must conform to the issue; and this verdict, on a former occasion, in *Arrants* v. *Dunlap*,[3] decided here last term, was held to cover the issues, or one of the issues, and therefore not to be immaterial and irrelevant. Five grounds of objection were taken to the defendant's discharge, when arrested at the suit of Arrants, and without reciting them, it may be confidently stated that they presented but two charges, variously modified. The first and fifth alleged that the schedule was fraudulent and false in this, that it did not contain all the effects of the defendant, but had omitted sundry articles of property enumerated, and particularly, large sums of money. The second alleged the schedule to be fraudulent and false in this, that it subjected the assets to a certain assignment, which was fraudulent, and the debts to be secured by it, pretensive and unfounded. The third was, that the defendant had fraudulently transferred and delivered his property to J. J. Dunlap, under the said fraudulent assignment, to defeat his creditors. And the fourth was, that he had given an undue preference to one creditor, to the prejudice of the plaintiff. His Honor, Mr. Justice O'NEALL, therefore correctly stated the accusation to be: 1. That the schedule was false. 2. That the assignment made to J. J. Dunlap, was fraudulent. Upon those questions issue was taken, and the jury rendered the following verdict. "We find the assignment to be false and fraudulent, and should be void."

I cannot perceive the force of the reasoning, by which this verdict is made to convict the defendant of having rendered a false schedule. There is no pretence that it was false, for having omitted any portion of his estate or effects. It seems to be admitted that everything was included; and the argument is, that it was a false schedule, because it subjected the effects to an assignment which was fraudulent. What is

meant by "a schedule, on oath, of his or her whole estate," is, that it shall contain a true account and statement of all the property of the defendant, or to which he had any just claim, subject, of course, to all prior liens or incumbrances; and the "false schedule" in the tenth section, is one which omits a portion of the property. It is not rendered a false schedule because it may specify liens which are even pretended or fraudulent; much less so, if the assignment to which it may subject the effects, be for a debt really due, although the assignment may be void, as an undue preference of one creditor to another. Now the assignment in this case may have been fraudulent and void, although there may have been a just debt due to James J. Dunlap.

The construction contended for by the actors on this motion, would abolish all distinction between three classes of cases provided for in the seventh section: 1, Making a false return. 2, Having preferred one creditor to another. 3, Having fraudulently sold, conveyed or assigned the estate to defraud creditors. By the tenth section, it is only a conviction of the first which would deprive the petitioner of the benefit of the Act then, or afterwards; and the provision itself, by the force of its own express terms, implies and supposes that there may be cases of fraudulent preference of creditors, or fraudulent assignment to one who is not a creditor, which would not come within the meaning of that section. Now, the verdict in question is obviously framed to meet the allegation of the plaintiff, that the assignment to J. J. Dunlap, was fraudulent; and not that the schedule was false. If the plaintiff had desired it, the jury might have been required to find on the other issues; or, if there was any ambiguity in the verdict, they might have been required to amend it. But if he acquiesced in it, as sufficient for his purpose, to prevent the discharge of the defendant without paying his debt, (which was the legal effect,) he cannot, or rather others cannot now, come in and claim to give it a more comprehensive

effect. The use of the word "assignment," would alone be sufficient to point the finding to the issue made on that subject; and when they add "and should be void," no doubt, I think, remains that such was the intention of the jury, for it would be senseless to speak of a schedule being void. The defendant by rendering a schedule which contained a true statement of all his visible effects and choses in action, or of such as he had owned, although subject to the claim of J. J. Dunlap under the assignment, cannot be deprived of the benefit of the insolvent debtors' law in other cases, because the jury have said the assignment was fraudulent. Admitting that the the verdict is equivocal in its terms; the very fact that the intention of the jury is uncertain, that we do not know that they meant to convict the defendant of having rendered a false schedule, and that they have clearly found the assignment to be fraudulent on the other issue, which was sufficient for the plaintiffs' purpose on that proceeding, should decide the present question, and induce us to construe the verdict so as to give it only that effect; especially when we consider that a different construction will have the effect of subjecting the defendant to lasting confinement.

On the second ground of the motion, we are all of opinion, that so far as regards the case of Arrants, the defendant was not entitled to his discharge. He was convicted, by the verdict in that case, of having made a fraudulent assignment to the prejudice of his creditors; and his case does come expressly within the second clause of the seventh section of the Prison Bounds Act, "nor shall *any* prisoner be discharged without fully satisfying the *action* or execution on which he is confined, if" [among other things] "he shall have fraudulently sold, conveyed or assigned his estate, to defraud his creditors." The words *any prisoner*, in connection with the word *action*, as distinguished from *execution*, together with the whole scope of the Act, to provide for persons confined either on mesne process, or on execution, demonstrates that

the opinion of the Court in the case of *McClure* and *Mims* v. *Vernon*, (2 Hill, 433,) was formed on a hasty examination and comparison of the different sections; and that the principal enactments, both of the fourth and seventh sections, relate to both classes of prisoners. If there were any doubt, it would be removed by the Act of 1833,[4] as remarked by Mr. J. BUTLER, in *Arrants* v. *Dunlap*. The defendant, under that verdict was not entitled to be discharged, without fully satisfying the action on which he was confined. And we think the Court below decided erroneously on that point.

The third ground being obviated, or abandoned, it remains only to remark on the fourth, that William Cavan, the witness proposed to be sworn, was one of those who resisted the defendant's discharge. He was one of the plaintiffs on the issue; he was necessarily to be benefited by any verdict, which would have the effect to retain the defendant in confinement until his debt was paid; and he could not testify without effecting his own interest. This Court concurs with the Circuit Court on that point.

A majority of the Court are of opinion, that the defendant was entitled to be discharged from all the actions or executions by virtue of which he was confined, except that of Arrants, in relation to which, the motion to reverse the circuit decision is granted. In regard to all the others, the motion is refused.

GANTT, RICHARDSON and EVANS, JJ., concurred.

BUTLER, J., *dissenting*. As I think by the terms of the verdict, in the case of *Arrants* v. *Dunlap*, the defendant was convicted of having rendered a *false* and fraudulent schedule, I dissent from the judgment of a majority of my brethren. The finding of the jury was, that the assignment by R. W. Dunlap to his brother, J. J. Dunlap, *was false* and fraudulent, *and void;* which, fairly interpreted, means that J. J. Dunlap was not a creditor, entitled to the property assigned to him;

but that it was the property of defendant, and should have been returned as such; that is, the defendant had returned property as belonging to another, which belonged to himself, and had sworn to it. The statement in the schedule was not true, although it was so represented by a false oath; and it is said this is not a false schedule. I suppose the schedule would have been regarded false, if the defendant had omitted to insert any piece of property in it; or had he stated that he had a limited interest in a piece of property, when he was the absolute owner; or had he concealed the true character of property which he represented as worthless; as, that property was in Texas, which he had in his own possession, and which he could immediately take into his own charge and subject to his dominion and enjoyment: in such cases, I take it, the schedule would be both deceptive and false. Fraudulent concealment and false representation may render a schedule false, as well as ignorant or wilful omission. It would be not the less false because it was disguised by crafty contrivance and fraudulent combination with another. In making a fraudulent conveyance, to defraud creditors, a man may also make thereby a false return, or schedule of his property. Not that every conveyance to defraud creditors would be false; for one might make a voluntary conveyance, or one on grossly inadequate consideration, to defraud creditors, and yet render a true return of his property; but when the conveyance is pretensive, and is intended to secure the property to the defendant himself, either directly or indirectly, it is no conveyance at all, except that it is on paper, and not verbal. Suppose it should appear, hereafter, that the property assigned by defendant had been re-delivered to him by a previous agreement, could his successful fraud exempt him from the operation of the fourth clause of the statute?

It seems to me, the jury have said what they intended to say, that the property, represented in the schedule, as belonging to J. J. Dunlap, belonged to R. W. Dunlap himself, and

should have been returned in his schedule, as liable to the demands of his just creditors.

Every unfortunate debtor should have extended to him, with alacrity and promptness, the benignant provisions of the insolvent debtors' laws; but one who has committed a fraud supported by a false oath, should be subjected to their proscriptive justice. I do not undertake to say that the defendant was guilty of fraud and falsehood; but I do say, the jury have convicted him of them, by the terms of their verdict, when construed in reference to the subject matter submitted to them.

Withers and *J. M. De Saussure*, for the motion; *Smart*, contra.

[1] 5 Stat. 80. *An.* [2] 4 Stat. 87. *An.* [3] Supra, 17. *An.* [4] 6 Stat. 491. *An.* See 9 Rich. 49; 10 Rich. 13. *An.*

B. BAGWELL *v.* J. JAMISON.

Quære, whether so much of 11 Geo. 2, c. 19, is of force here, as provides that defendants entitled to rent may give special matter in evidence under the general issue.[1]

In trespass against a bailiff, for levying under a distress warrant alleged to be void, defendant justified by plaintiff's admissions that rent was due. Acknowledgments by the landlord, (deceased,) of partial satisfaction, were admitted in reply.[2]

Levy, under a distress warrant, some months after the death of the landlord who had issued it, was a trespass; for the warrant was but a power of attorney, which expired *eo instanti* with the principal's death.

Executors and administrators may not distrain for rent due at the death of their testator or intestate. The stat. 32 Hen. 8, c. 37, to the contrary, not of force here.

The acquiescence, in a trespass, of one who has been deceived by a pretence of legal authority, is not such consent as to affect his remedy at law.

Trespass *vi et armis* is the proper remedy for a levy under a warrant avoided by the landlord's death, or under a pretence of authority in his administrator.

Before EARLE, J., at Laurens, Spring Term, 1840.

Trespass vi et armis, for taking certain household chattels,

&c. The taking, in September, 1838, was proved, and a subsequent sale by the defendant, to the amount of about one hundred and fifty dollars.

On the general issue, the defendant was permitted by the plaintiff to justify. He relied on a distress warrant issued by one Kingman on the twenty-sixth April, 1838, for one hundred and ten dollars, claimed as rent for 1837. Soon after issuing this warrant, Kingman died, and the subsequent proceeding was under the authority, or by the direction of Squire Colhoun, the administrator of Kingman, who was present on the occasion of the levy. The advertisement of the sale was signed by Colhoun, and bore date the twelfth September, 1838. The defendant relied, also, on the plaintiff's acknowledgment that rent was due, and on his not resisting the levy, or forbidding the sale, but expressing his anxiety that the rent should be paid.

The evidence on the question of rent in arrear was uncertain, and consisted entirely in admissions of the plaintiff. In reply to which, (there being no actual demise shown, nor any evidence in writing, or by parol, of the duration of the term, or of the amount of rent reserved, or when payable,) the Court admitted the admissions of Kingman to be proved, that he had received near three bags of cotton in the Fall of 1837, in payment of rent. Such admissions, the presiding Judge observed, he apprehended were competent under any circumstances. The warrant was the act of the landlord only, and, to afford a legal justification to his bailiff, it should have been made to appear that the landlord had authority to issue it at the time, and for the amount specified.

But, expressly waiving that point, his Honor put the case to the jury on the single ground that the death of the landlord, after granting the warrant to the defendant, and five or six months before any proceeding was instituted under it, was a revocation, in law, of the authority; and that the administrator could not, afterwards, enforce the distress by levy and sale.

On the principle of *volenti non fit injuria*, the jury were instructed that the plaintiff might have waived the trespass by assent; but not, if his submission arose from the impression that he could not resist what he was led to believe was a legal process.

Verdict for the plaintiff three hundred dollars.

The defendant moved the Court of Appeals for a nonsuit, because the action for the injury alleged should have been *case* and not *trespass*.

And for a new trial on the following grounds:

That the declarations of Kingman had been improperly admitted:

That his Honor erred in charging that the warrant was void, notwithstanding the plaintiff had consented to the levy and sale.

Curia, per EARLE, J. The general rule of pleading in actions of trespass, at common law, is that, whenever the act complained of would, *prima facie*, appear to be a trespass, any matter of justification, or excuse, such as a warrant, or other authority, must be specially pleaded. The statute 11 Geo. 2, c. 19,[1] provides that, in actions against persons entitled to rent, they may plead the general issue, and give the special matter in evidence. That statute has not been made of force in this State; although in *Pemble* v. *Clifford*, (2 M'Cord R., 41,)[3] the Court says that it "has been adopted in practice, and, as a usage, has become obligatory upon us." There are other important provisions in that statute, which I am not prepared to say that I should consider part of the statute law here; and how far it is to be considered of force, I shall reserve my opinion until some question shall specially arise.

The defendant, in the case under consideration, relied for his justification on the warrant of distress issued by King-

man, April 26, 1838. As it was only the private act of the landlord, it had none of the force of a judgment, or execution, so as to be conclusive evidence of rent in arrear; and it was necessary to prove, in some way, that rent was due. The acknowledgments of the plaintiff were competent for that purpose, and, if sufficiently explicit and certain, might have established both the tenancy and the amount of rent due. If they were competent for that purpose, surely the admissions of the landlord, who gave the warrant, and for whose benefit the distress was made, were equally admissible to show that the rent had been paid, either in the whole or in part. Such admissions do not come within the rule of hearsay evidence, and are not rendered competent in consequence of the death of the landlord: they are competent as the admissions of the principal party in interest.

A warrant of distress is nothing but a power of attorney. The bailiff, or other person executing the warrant, is only the agent of the landlord. And the power, both in regard to the extent of the authority and its duration, is to be construed according to the law of principal and agent, except where regulated by statute. It is the general and settled doctrine, that the authority of an agent determines by the death of his principal, which is an absolute and instantaneous revocation of the authority of the agent, unless the power be coupled with an interest. (2 Kent Com., 646.) No valid act can be done in the name of a dead man.

The defendant, having exhibited the warrant as his justification, ought, perhaps to be held to it, in the same manner as if he had pleaded it specially. But his defence, in the argument here, has been put, in part, upon the ground that Colhoun, the administrator of Kingman, by whose order the distress was made, was himself personally present, and, therefore, that it was a lawful distress, without the warrant. At common law, neither the heirs, executors, nor administrators

of a man seised and entitled to rents, had any remedy for the arrearages incurred in the lifetime of the owner of such rents. (Co. Lit. 162, *a.*) For remedy whereof the stat. 32 Hen. 8, c. 37,[4] provided that the executors and administrators might distrain for rents due their testator or intestate, at the time of the death, upon the land charged with the rent; and a later statute, in England, in the time of William IV., has been found necessary further to extend this right of the representatives of a deceased landlord. But the stat, of 32 H. 8, has never been made of force here, either expressly by the Legislature, or by necessary implication; nor am I aware of any judicial decision by which it has been held to be of force, as other English statutes have been, especially on the subject of rent; and sometimes, perhaps, without sufficient reason. The remedy by distress is a rigorous proceeding, often harsh in its operation, not congenial to the spirit of our institutions and government, and not to be extended beyond the clear and settled limits, except by express enactments of the Legislature.

That the plaintiff might waive the want of legal authority to distrain, and might assent to the taking and sale of his goods, so as to prevent him from maintaining trespass, is clear enough, and so the jury were instructed. If he was misled into acquiescence by a show of authority which was not legal, but which he was induced to believe was so, it was only an aggravation of the trespass.

If the warrant of distress was a nullity, in consequence of the death of Kingman, and if the administrator had no legal power to make distress, either personally or by bailiff, then the defendant's justification only fails, as there was no lawful authority for taking the goods, although there may have been rent in arrear. It was not a mere abuse of authority so to make *case* the proper remedy; but an unlawful taking, without authority, and trespass was properly brought.

The motion for nonsuit, as well as for new trial, is therefore refused.

GANTT, EVANS and BUTLER, JJ., concurred. RICHARDSON and O'NEALL, JJ., absent.

Sullivan, for the motion; *Irby*, contra.

[1] *Ante* 100. *An.*
[2] 6 Rich. 213. *An.*
[3] 2 Stat. 579. *An.*
[4] See 1 Sp. 285. *An.*

ALLEN JONES *v.* HUGH MULDROW, ET AL.[1]

Defendant, in trespass claimed as tenant of S., and adduced evidence to his tenancy and to S.'s title; but, was proved to have entered as plaintiff's tenant, and was, therefore, evicted. This did not conclude him, after having regained possession, from holding under the title of S.

A point on which evidence has been given, on the trial, but on which, in consequence of what afterwards appears, the party is not permitted to rely, is not concluded by the verdict.

Where it did not fully appear, by the record, what was the precise issue submitted to the jury, other evidence was admitted for the purpose of ascertaining the scope of their verdict.

Before O'NEALL, J., at Darlington, Spring Term, 1840.

Trespass quare clausum fregit. The close was, originally, the property of one Stephenson. As such, it was sold, by the Sheriff of Darlington, Richard Ingram, to John Ingram: by John, it was conveyed to Bryant Ingram; by him, to Richard Ingram, and, by him, to Pleasant R. Gee, who sold to the defendant, Muldrow, executed a bond for titles, and died. The heirs of Gee, for Muldrow, brought suit, (by a previous action, *Gee* v. *Jones*, Rice R. 64,) against this plaintiff, Jones, and his son James, for the recovery of the land. Jones's defence was, that he was in possession under Stephenson, and that the sheriff's sale was fraudulent; but it

was proved by the plaintiffs in that case, that Jones had gone into possession as the tenant of Richard Ingram, Jones was ejected by a writ of *habere facias possessionem*, and Muldrow was put in possession.

About a year afterwards, while Muldrow's tenant was removing from the land, Jones entered and retained possession under Stephenson.

The defendants now contended that the plaintiff was concluded by the former recovery, and could not set up Stephenson's title. But the Court thought that Stephenson's title had not been legally in issue on that trial; for Jones had been estopped, by his tenancy to Ingram, from relying on it.

Curia, per BUTLER, J. The true question, in this case, is, was Jones barred by the recovery against him, in the case of *Gee* v. *Jones*, from availing himself of Stephenson's title at any subsequent time, either by action, or in defence. And this question depends, not only on what was decided in that case, but upon whether it be allowable to inquire into and ascertain by evidence, what was the issue which was submitted to the jury, and which *necessarily* fell within the scope of their verdict. For, if the verdict of the jury was but the judgment of the law upon a point that superseded all others, and which must have precluded the consideration of Stephenson's title, then the case would be relieved of some of the embarrassing circumstances that seem to attend it.

There was nothing apparent on the record of *Gee* v. *Jones*, that could be pleaded, or used by the present defendants by way of *estoppel* to Jones's rights under Stephenson's title. An estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact which, having been once distinctly put in issue by them, or by those with whom they are privy in estate, or law, has been, on such issue joined, solemnly found against them. It is not the recovery, but the matter alleged by the party, and upon which the recovery

proceeds, that creates the estoppel. (*Outram* v. *Morewood*, 3 East. R. 355.) Now, if Jones had alleged in his pleadings, in the case of Gee against himself, that he relied on Stephenson's title, then the verdict would have been an estoppel to him as to the same title. No such thing appears on that record, and the recovery may or may not be a bar, according to circumstances.

If Stephenson's title, which, it seems, was given in evidence by Jones on that trial, either was, in fact, or could have been passed on by the jury, it might be a bar as to the parties to the record and their privies. This brings up the question, is it competent to go into that trial to ascertain what were the issues submitted to the jury, and upon which they must have decided?

In the case of *Seddon* v. *Tutop*, (Esp. R. 401,) it was decided that, where there has been judgment by default, in an action on a bill of exchange, and, also, for goods sold and delivered, and the plaintiff, by mistake, takes a verdict for but one of these demands, he may afterwards maintain an action for the other. LORD KENYON, who delivered the opinion of the Court, says, "where a man brings an action, it must be presumed it is for the whole of his demand, but it is not conclusive; he may show that, in point of fact, he did, in such action, go to recover part of the demand only. He may also show that he did not, under the first action before the jury, go into any evidence of that demand which is the subject of the second action; for, if he did, and failed, it would be conclusive." According to this, was it not competent for the plaintiff, Jones, to go into the evidence, to show what were the issues which were submitted to the jury on the former trial? I think he was properly allowed to go into such evidence.

This does not relieve us from another serious difficulty, which is, that it did not appear that Stephenson's title was in evidence on the former trial; and, if the jury could have

passed on it, it fell within the scope of their verdict, and was concluded against this plaintiff. Upon examination, it will be found that the jury was not required to decide on that matter. Their verdict must be referred to a matter on which the law, itself, had pronounced its judgment independently of all other questions involved: viz. that Jones, having gone into possession of the land, as the tenant of Richard Ingram, could not claim against his landlord by any title which he might have acquired. The circuit Judge reports that it was *proved*, on the former trial, that Jones had been put in possession of the land as the tenant of Richard Ingram. Whilst he occupied that relation, it is evident he could not acquire and be clothed with any other title, to defeat that of his landlord. It was not competent for him to be invested with Stephenson's title until he was either evicted, or had gone out himself, voluntarily. From the report, we must assume that the question was not submitted to the jury, whether Jones was tenant of Ingram; but that it went to a jury, as a conceded or established fact, that he was so. And, for the purpose of presenting the case as I wish to consider it, suppose that when Jones was sued by Gee, he had set out in a plea that, since he went on the land, he had acquired Stephenson's title, and that he was, by virtue thereof, the true owner of the land; and the plaintiff had replied that such plea should not avail him, for that, by a written lease, Jones had gone on the land as tenant of the plaintiff, or his lessee; and that Jones had demurred to this replication. The judgment of the Court would have been, to overrule the demurrer; the effect of which would have been to evict Jones on account of his tenancy, and not to touch Stephenson's title, which was admitted by the demurrer. The case having gone to the jury on this precise state of facts, their verdict embraced nothing more than the conclusion of law. Not that the title set out, or given in evidence, was bad, but that Jones could not avail himself of it. The validity of the title, and Jones's ability to

use it, are different things. Technically and strictly speaking, Jones was not availably and beneficially invested with Stephenson's title, until after his eviction, and therefore subsequent to the former trial.

I think, therefore, that Jones was not precluded, by any thing in the former recovery, from protecting himself under Stephenson's title, which it seems, was never divested by the basely fraudulent attempts to destroy it.

But it is said that, when Jones took Stephenson's title, or rather authority to enter under it, he should have gone out and have brought his action, either in his own or in Stephenson's name, and that not having done so, he was precluded from all right to resort to it at any subsequent time, without offending the maxim *nemo debet bis vexari.* The course indicated may have been desirable, but I do not think that a man's mistake, or forbearance in the assertion or exercise of his rights, should always destroy, or put them in jeopardy, so that he cannot ultimately enjoy them. After Jones's tenancy had been dissolved by his being put out of the land, he had a right to re-enter under the true legal title, unless it had been previously adjudicated; which we think had not been done. His entry on and possession of the land being lawful, the plaintiff has shown his right to maintain this action. The verdict must therefore stand, and a new trial is refused.

GANTT, RICHARDSON, EVANS, and EARLE, JJ., concurred.

Dargan and *Sims*, for the motion; *Law*, contra.

[1] *Gee* v. *Jones*, Rice, 64. *An.*

See as to the effect of the verdict in the former case: *Beck* v. *Bridges*, 11 Rich. 90; *Samuel* v. *Dunkins*, Col., May, 1859, 11 Rich.; Harp. 370. *An.*

BENJAMIN JACKSON *v.* EDWARD LEWIS AND MILES WILLIAMS.

Law of *Navigable Rivers* considered.

Quære, whether the *Catawba*, in Chester district, is a navigable river.

Quære, whether an unnavigable channel, severed by an island from the main stream of a navigable river, be subject to grant.

Occupation of a spot for five or six weeks annually, as a fishing place, is not possession sufficient for the statute of limitations.

Defendant, in trespass for a fishery, under the plea of *liberum tenementum* showed a title in common with G., but plaintiff proved an elder title. G.'s testimony was then offered to prove defendant's right by prescription to fish—objected to for interest, as tenant in common, but held competent.

Before EVANS, J., at Chester, Spring Term, 1839.

Trespass for breaking up the plaintiff's *fish-stand*, in the Catawba river. Pleas,—general issue and *liberum tenementum*.

The plaintiff claimed, as owner of the soil, under a grant to one Platt, in 1772. The defendant, Lewis, relied on a grant to one Massey, in 1793, who conveyed to Perry, who conveyed half the land to this defendant. The other half was afterwards conveyed, as Perry's property, by the sheriff, to Jeremiah Gaither. The stand was erected on the west branch of the river, between the main shore and Mountain island; the stream being divided, by that island, into two channels, of which the eastern one is navigable, but the western never used for boating. Each of the grants in question covered both shores, and included spot on which the stand had been. The presiding Judge inclined to the opinion, that the Catawba, as a navigable river, was not subject to be held under a grant of vacant land, and remarked that, when he came to the bar, the controversies about the fisheries on this river were very common; and he had a strong impression that the grants of the rocks and places within the stream, where fish stands were erected, had been held void. Nor did it appear to his Honor that the boat sluice being on the other side of

the island varied the case. But these points he reserved for the consideration of the Appeal Court.

The defendant proved that those under whom he claimed had been accustomed to take fish at this stand for a long time. The season was only a month or six weeks in each year, and the stand was abandoned till the year ensuing. His Honor thought that this was not such a possession as would give title, under the statute of limitations, against the plaintiff's older grant; but, on the question, whether the defendant had acquired a right to the fishery and the stand by *prescription*, the jury were instructed that twenty years uninterrupted use would give a right even against the State; and that such use need be only coextensive with the right claimed. On this point there was evidence on both sides.

In the course of the trial, Jeremiah Gaither, being called as a witness, was objected to as tenant in common with the defendant. Under the defendant's plea of *liberum tenementum*, the question was, is the land his? so the Court thought the witness was not competent.

Verdict for the plaintiff.

The defendant moved the Court of Appeals for a nonsuit, on the ground that the Catawba, being a navigable river, no part of its bed could be claimed under a grant; and for a new trial, because the evidence of Gaither had not been admitted.

Curia, per EARLE, J. In *Boatwright* v. *Bookman et al.*,[1] this Court decided that the right to take fish in public navigable rivers is common to all; and that, in the exercise of that right, one may lawfully put a trap or other fixture in the channel of the river, without making himself liable as for a public nuisance, if such trap or other fixture do not interfere with the navigation, or obstruct the free passage of fish. Whether the public is the actual owner of the soil covered by water in such rivers, or has merely a servitude for the public interest, as a

highway by water, the Court thought might deserve consideration; and they did not think it necessary to decide whether the owners of the soil on either side possess any exclusive right of fishery, or to what extent. In this case the grants, both of the plaintiff and defendant, do not stop with the shore, calling for the river as a boundary, but have been so located as to include the whole stream on the western side of Mountain Island, the channel on the eastern side being that which is used for navigation;—and they both include the place, in the stream, where the plaintiff's fixture was put up. That under which the plaintiff claims, is by many years the oldest; and, as the land granted in both is on the same side of the stream, no question arises on the application of the rule of *usque ad filum aquæ*. But, in such a stream, not navigable, and not proved to be capable of being made navigable, the Court would not undertake to say that the owner of the soil may not have, by virtue of his grant, an exclusive right of fishery to the middle of the stream. Indeed, at common law, such a right would exist, without regard to the circumstances of its being capable of navigation. How far that principle is applicable in this country, and how far it may have been modified by legislation or usage, need not here be considered. I presume any exclusive individual right in the owner of the soil, if allowed to exist, would, of course, be subject to such municipal regulations as the Legislature might adopt, both in regard to navigation and in regard to the free passage of fish.

Whether, therefore, as in Pennsylvania, the soil and the waters of rivers, such as the Catawba, with the rights and privileges incident thereto, remain with the public, (which, as was said in *Boatwright* v. *Bookman*, may depend on the Acts regulating the granting of vacant lands, or on the grants themselves,)—or whether, as at common law, the owner of the adjoining land is entitled to the exclusive fishery to the middle of the stream; the defendant and those under whom he claims, are equally excluded from any supposed benefit de-

rived from the grant to Massey in 1793. In the former case, the grant, if the oldest or only grant, conferred no right of exclusive fishery as incident or appurtenant. In the latter case the right had already vested in a former proprietor by virtue of the grant to Platt in 1772. Supposing the right not to be incident to the grant, but to be public and common, then the plaintiff in the exercise of a common right, had erected a fixture or fish-stand, where he lawfully might and for a lawful purpose,—and it was a trespass to destroy it. So if it were incident to the grant, and passed with it, he was equally in the exercise and enjoyment of his exclusive right, and the defendant was equally a trespasser.

But the right of fishery, either as against the public, or as against an individual proprietor, may be acquired by prescription. And such was the defence attempted here. But the right by prescription which the defendant set up, was not alleged to have been acquired by himself, but by Perry, a former proprietor of the land granted to Massey, under whom defendant also claimed the same land. None of these parties, either plaintiff or defendant, were, or had been in the actual occupation or cultivation of the land granted. The constructive possession of the soil, therefore, was with the plaintiff. But the case attempted to be made was, that Perry had, for very many years, annually occupied this particular spot, with a similar structure, for the purpose of taking fish, and had therefore acquired a prescriptive right, either against the public, or against the individual proprietor of the elder grant. And for this purpose he offered Jeremiah Gaither as a witness, whose competency was objected to, on the ground of interest, from these facts; Massey conveyed to Perry, about 1802; Perry conveyed to defendant, Lewis, an undivided half of the land, in 1827, describing it as "a plantation or tract of land lying on an island in the Catawba River, known by the name of Mountain Island," with the appurtenances; and, in 1831, the other half was sold by the sheriff, under judgment and

execution, as Perry's property, and purchased by Gaither, to whom the sheriff conveyed it. He was therefore tenant in common with Lewis, and said to have an interest in sustaining the prescriptive right; and was excluded by the Court. This constitutes one ground of exception to the verdict. The Court are of opinion that the witness was competent.

In regard to the interest which will exclude a witness, the general rule seems to be, that if a witness will not gain or lose by the event of the trial, or if the verdict cannot be given in evidence for or against him, in another suit, the objection goes to his credit only, and not to his competency. An interest in the question only, will not, therefore, generally disqualify a witness. He must either be interested in the result of the action, or in the record, as an instrument of evidence. In the application of this rule, it is held that, where a right of common is claimed by custom, one who claims under the same custom cannot be a witness in support of the claim, as he might afterwards use the verdict, in his own cause, to establish his own customary right. (1 Term, 302; 3 *id.* 32.) And here, if the defendant had justified by plea, under a prescriptive right of fishery in himself and Gaither, jointly, and had offered Gaither to prove it in Perry, their grantor, in right of the particular estate which they held of him, I think he would clearly have been incompetent. *Jacolson* vs. *Fountain, et al.* (2 John. Rep. 170.) But the plea is *liberum tenementum* in the defendant; and the proof was that Perry, in whom they set up the prescriptive right, was never in the occupation and enjoyment of the particular estate, the freehold of which was in the plaintiff. Whatever right, therefore, may have been established by prescription in Perry, either against the public, or against the grantors of the plaintiff, was an incorporeal hereditament, not incident to the particular estate, and therefore, did not pass to Gaither, or to the defendant, by virtue of the several deeds under which they held; not denying that it may have been such a right

as would pass by deed. Gaither, therefore, had no interest in the result of the action, nor in the record as an instrument of evidence. But the same considerations which prove the competency of the witness, show that the proof could not have availed the defendant; and that the issue made, whether there existed a prescriptive right in Perry, was an immaterial issue. The action was trespass; on the plea of *lib. ten.*, the case was against the defendant. And it was no justification that Perry, who, in that regard, was a stranger, had a right by prescription to take fish there.

As the counsel who makes the motion states distinctly, that Gaither was offered only to sustain the prescription in Perry, and for no other purpose; and as we think it could not have availed the defendant, if established, it could be of no benefit to order a new trial on that ground.

The motion is therefore refused.

GANTT, RICHARDSON, O'NEALL, EVANS and BUTLER, JJ., concurred.

Clark and *McDowell*, for the motion; *Gregg*, contra.

[1] Rice, 447. *An.*

See *McCullough* v. *Wall*, 4 Rich. 81, 88, approving the result of this case, but opposing the views taken in it. *An.*

THE STATE *ex rel.* OF JOHN FOX *v.* REUBEN HARMON.

The District Election Act of 1815, is not absolutely repealed by that of 1839, and was the proper law to govern an election held, after the passage of the new Act, to fill a vacancy which had occurred before it.

Minute irregularities, not affecting the fairness of an election, will not invalidate it.

A Clerk of Court appointed to fill a vacancy by death, resignation, &c., holds only till the expiration of the term of the original incumbent.

The day prescribed. by the Act of 1839, for the managers to meet and declare the election, is misprinted in the published Acts, *Monday*. It should be *Wednesday*.

Before O'NEALL, J., at Chambers, March 5th, 1840.

The following is the report of the Circuit Judge, in this case:

This was an application for a *quo warranto* against the respondent. It appeared that Edwin Scott, the former clerk of Lexington district, resigned in 1838, and the respondent was appointed *pro tem.* by the governor. In October, 1839, he advertised an election to take place on the second Monday and Tuesday in January, 1840. In the December succeeding, the Legislature passed an Act, by which it is provided that, "whenever a vacancy is *about* to occur in the office of clerk, ordinary, or sheriff, in any district in this State, by expiration of the term of the incumbent, it shall be the duty of the acting clerk of the Court of Common Pleas, at least two months before the term when such vacancy shall happen, to advertisean election at the court-house door, &c. (Acts of 1839,[1] sec. 1, p. 37.) By the second section it is provided, "when any vacancy *shall* occur in either of the offices aforesaid, by the death, resignation, removal from the district or State," &c., it shall be the duty of the clerk to advertise for an election, &c. The fourth section provides for the meeting of the managers at the court-house, in the printed copy, on the *Monday* after the votes are received, but it should be on the *Wednesday* after the votes are received.

"The managers went on, and held the election on the second Monday and Tuesday in January, and, on the Thursday following, met at the court house, counted the votes, heard a contest, and declared the relator duly elected, who was commissioned by the governor.

"I thought the relator was entitled to the office. The election was properly held under the Acts of 1815; (A. A. 1815,[2] p. 56;) for the Act of 1839 did not provide for the case of a vacancy existing at the passing of the Act. It applied exclusively to vacancies occurring after its passage. It contained no repealing clause. The Act of 1815 was therefore in full force, and governed cases occurring before the Act of 1839.

"The notion that a clerk appointed *pro tem.* was entitled to hold for four years, seemed to me to be unsustained by anything like reason or law. The clerk has no constitutional tenure of office; it is one altogether regulated by Act of the Legislature. When the Legislature gave the governor power to appoint until the office should be filled by election, an appointment under this authority could confer no greater tenure. It was not like the case of the sheriff, whose tenure was regulated by the constitution; when once in office, he was in for four years, his constitutional term.

"Information, in the nature of a *quo warranto*, was considered as previously filed by leave of the Court, and the writ of *quo warranto* was ordered."

The respondent appealed, on the grounds:

1. That no election could have been held under the circumstances; for the Act of 1815 was repealed, and the supposed vacancy in question was not provided for by that of 1839.

2. That the respondent was entitled to hold, under the governor's commission, for four years.

3. Because the managers had assembled on Thursday, (instead of Monday, as the law directed,) to declare the election.

4. Because two-thirds of the managers were not present to judge of and declare the election.

Curia, per RICHARDSON, J. We need add but little to the exposition, by the circuit judge, of the law or of the facts upon which this application was made.

The Act of 1839 does not repeal the election law of 1815, (6 Stat. So. Ca. 11,) but so alters its provisions as to leave it applicable to only a few cases. I would not say that any further vacancy in office can be filled under its provisions; but it still stands to meet a possible case, and forms a part of our system of popular appointment to office. The Act of 1839, by its first section, provides for vacancies about to occur by the expiration of an office at its legal or constitutional termination; and requires the Clerks of Courts, "at least two months" before such regular termination, to advertise an election, in order to anticipate the expected vacancy. The clerk is, also, to name some Monday *within* the sixty days, (to prevent an interregnum, evidently,) but exceeding thirty days, after the date of his advertisement, as the day of election. Section 2 provides, "when any vacancy *shall* occur" by death, omission, or refusal to serve, or the like, the clerk shall give the same timely notice, and so forth. Both sections are prospective, and provide for vacancies that were to occur after the passing of the Act, December 21, 1839.

The question, therefore, is, did the vacancy in the clerk's office at Lexington, exist on December 21, 1839.

The Act of 1815 provides that elections, to fill such vacancies, shall be holden on the second Monday, and the day after, in January; and the officer elected shall go into office on the second Monday in February thereafter. And the third section of that Act provides that the governor shall fill up all vacancies, etc., "to hold under such appointment until such time as an election shall take place," etc. When the governor, then, appointed Reuben Harmon to the office vacated

by Edwin Scott, the appointee was to hold the office either till the election in January, or, perhaps, to the second Monday in February—when, by the Act, the person elected would go into office. Now, then, if we are to consider the clerk's office as vacant from the moment Edwin Scott resigned it, the vacancy had occurred before the Act of 1839; and therefore the election could not be brought under its provisions, and the argument of the circuit judge would be conclusive.

But, if we are to consider the appointment of Reuben Harmon as a legal filling of the vacancy, so as to constitute a perfect term of office, to expire regularly, either upon the election in January, or on the second Monday in February—then no casual vacancy had occurred so as to bring the election within the second section of the Act of 1839; but it would be, in the language of the second section, "a vacancy about to occur" upon the regular termination of the office, (in January, or February;) and, then, the clerk could not have advertised "at least two months" before the term of the office would have expired, for two months could not elapse between December 21 and the second Monday in February.

It is plain, then, that under any construction, the vacancy in question could not have been filled by an election held under either section of the Act of 1839; and the managers, therefore, very properly held the election under the Act of 1815.

It is still very possible that other elections may yet be holden under that Act. The Act of 1839 requires that the clerk shall advertise the elections, and a subsequent section renders him indictable for a high misdemeanor, if he fail to give the notice required by the Act; and, upon such failure of the clerk, the commissioners are directed, nevertheless, to advertise and hold the election. But suppose the very possible case of there being no clerk to give the notice, and of course, no clerk to *fail* of giving the notice. Is it not at least ques-

tionable whether the managers would not, in that case, be obliged to hold the election under the Act of 1815, in order to prevent its failing altogether?

The chief grounds of exception to the election of the relator are, then, clearly unfounded in law. To meet the objection of irregularity, which the grounds suppose, it may be observed, that the end of popular elections is to discover which of the candidates has the greatest number of votes from among the qualified voters. The polls are, of necessity, holden by many persons, at different places, and such elections are, of course, subject to irregularities. Where, then, after legal notice to the voters, the polls have been fairly holden by the proper managers, at the places, and for the time designated, and one of the candidates has received a greater number of votes than the rest, he is the proper appointee, and the end of the election is answered. It follows, irresistibly, that we are to construe the rules for the regulation of popular elections with a constant direction to that end, and not to be deterred by minute objections and mere irregularities of manner or form. It is upon such considerations, that both the Act of 1815 and that of 1839 make the validity of the election depend, in the first instance, on the decision of the managers themselves. By the former Act, a majority may decide; by the latter, the presence of two-thirds is required: which answers the fourth ground of appeal, in reference to the number required to decide the election. That ground applies to the Act of 1839, only. In fact, all the objections to the election of the relator depend upon the assumption, that the election ought to have been held under that Act; which being shown to be groundless, the rest have no material application to the case.

Upon the whole case, therefore, the Court are unanimous in confirming the judgment of the circuit judge, and the appeal is dismissed.

[1] 11 Stat. 24. *An.* [2] 4 Stat. 12. *An.*
See Harp. 139, 319; 1 McM. 497; 2 Rich. 6; 5 Rich 303. *An.*

CASES AT LAW,

ARGUED AND DETERMINED IN THE

COURT OF ERRORS OF SOUTH CAROLINA.

Columbia—Spring Term, 1840.

LAW JUDGES PRESENT.	CHANCELLORS PRESENT.
HON. RICHARD GANTT,	HON. DAVID JOHNSON,
" JOHN S. RICHARDSON,	" WILLIAM HARPER,
" JOHN BELTON O'NEALL,	" JOB JOHNSTON,
" BAYLIS JOHN EARLE,	" BENJAMIN F. DUNKIN.
" ANDREW PICKENS BUTLER.	

WM. J. ALLSTON AND OTHERS *v.* W. THOMPSON.

A deed without any subscribing witness is not a valid deed to convey land.

Before EVANS, J., at Greenville, Fall Term, 1838.

This was an action of trespass to try title. Plaintiff traced his title through a deed from Robert Cochran, Marshal of the United States, for the District of South Carolina. This deed was without any subscribing witness, and the only proof of it offered was evidence to the handwriting of Cochran. There had been no possession under it.

The Court was of opinion that, as this deed was not in the form prescribed by the Act of Assembly, nor in that of any of

the common law modes of conveyance, and was without a subscribing witness, it was not a valid deed to convey land. So the plaintiff was nonsuit.

The plaintiff moved the Court of Appeals, in November, to set aside the nonsuit; and, the Court being equally divided upon the question, the case was carried up to the Court of Errors, and postponed to the next term.

In the meantime the following similar case occurred of *Craig* v. *Pinson*, and the two cases were considered together by the Court.

ARCHIBALD CRAIG *v.* HOWARD PINSON.

A deed with only one subscribing witness is not a valid deed to convey land.

Before O'NEALL, J., at Laurens, Spring Term, 1839.

This was an action of trespass to try title, in the course of which a deed was introduced *not pursuing the form prescribed by the Act of* 1795,[1] and executed in the presence of one subscribing witness, by which the plaintiff had conveyed the land in dispute to a third party. Upon the presiding Judge intimating that the deed was a good conveyance, and the title, therefore, out of the plaintiff, he took a nonsuit, with leave to move the Court of Appeals to set it aside. Which motion was now made.

Curia, per BUTLER, J. It was conceded in argument that the paper in question, in this case, if valid at all as a deed, must be so under the Statute of Uses, as a *bargain and sale;* for it was not pretended that it was good as a common law instrument, there never having been livery of seisin, or possession under it. It must be judged of according to its literal purport

and what appears on the paper itself. It must be assumed that it was duly signed, sealed and delivered, and that it had one subscribing witness. And the question then arises, can a deed of bargain and sale be good and effectual for the conveyance of freehold, according to the law of South Carolina, without having at least two subscribing witnesses?

In 2 Comm. 307, Blackstone says, "the last requisite to the validity of a deed is the attestation, or execution of it, in the presence of witnesses; though this is necessary, rather for preserving the evidence than as constituting the essence of the deed." From which it would seem, that according to the laws of England, subscribing witnesses are not essentially necessary to the validity of a deed. In the early and barbarous ages of the law, few could write or sign their names; and a deed derived its validity from the seal and the transmutation of possession from one to another. This was done usually in the presence of many witnesses, and with great form and ceremony. I doubt whether there ever was a deed at common law or under the statute of uses, that was not executed in the presence of witnesses. Livery of seisin seems to imply publicity and the presence of witnesses. I have examined many forms of deeds presented by conveyancers, and all of them, without exception, have a clause of attestation in the presence of at least two subscribing witnesses. Such has been the universality of the practice in this country, that all my brethren concur in saying that they never saw an effectual deed for the conveyance of land, (unless this be one,) which was not executed in the presence of subscribing witnesses. An instrument of this kind has been held good, as an agreement in writing, to authorize equity to direct a specific performance.

It is supposed that the deed which was held a good bargain and sale in the case of *Rugg* v. *Elles*, (1 Bay R. 107,) was without subscribing witnesses. Such a conclusion is not justly inferable from the report of the case. The deed bore date,

August 10, 1785, and was said to have been executed in the presence of witnesses. The reporter does not undertake to give the entire deed literally, but says it was "in substance, as follows." There is neither seal nor witness to it, as copied; and yet it is certain there was a seal to the original, and probably witnesses. Whether witnesses were legally necessary, was not a question in the case; the question was, whether, in character, it was a bargain and sale; and, if so, whether a bargain and sale was effectual to carry land without livery of seisin; and it was determined that it was. But if it *had* been held that witnesses were unnecessary, then it would not affect the question now before the Court, as that decision was made before 1795.

I will now inquire what is a deed and bargain of sale, and see whether, in its essential and distinctive characteristics, it is distinguishable from the form of deed presented by the Act of 1795. In the case of *Rugg* v. *Elles*, the reporter says, at the conclusion of the opinion of the Court, that since the decision of the case, which was in 1790, (the reporter publishing his work in 1809,) by an Act of the Legislature, a bargain and sale is declared to be a good deed to pass the fee, in all cases, without livery of seisin. I can find no other Act, and I believe there is none, on the subject, except that of 1795, which presented the form of deed now in use; and that the reporter regarded as nothing but a bargain and sale. And when examined and analyzed, it will be found to be nothing else; or, at least, it includes a bargain and sale in it.

One of the species of conveyance introduced by the statute of uses, which, as Blackstone says, is a kind of real contract, whereby the bargainor, for some pecuniary consideration, bargains and sells, that is, contracts to bargain and sell, the land to bargainee, and becomes, by such a contract, trustee for and seised to the use of the bargainee; and then the statute of uses completes the purchase. But, as it was foreseen that conveyances thus made would want the notoriety which the

old common law assurances were intended to give; to prevent, therefore, clandestine conveyances of freehold, it was enacted in the same session, by Stat. 27, Henry 8, c. 11,[2] that such bargain and sale should not inure to pass a freehold, unless the same be made by *indenture*, and enrolled within six months, in one of the Courts of Westminster Hall, or with the *custos rotulorum* of the county. It is evident that this last statute, requiring enrolment, could not have been practically in force in South Carolina; as such deed could not have been enrolled or recorded as therein required; and the only deed of the kind, the one in the case of *Ruggs* v. *Elles* noticed in our reports, was a deed poll, and not an indenture. A bargain and sale must, therefore, have been regarded as good under the statute of uses. Such a mode of conveyance seems not only to have received the sanction of the Court, but is recognized in several Acts of our Legislature, before and after the Revolution. In what is called the quit-rent Act of 1631, it is enumerated among others, (3 Stat. So. Ca. 302, section 28;) also in the recording Act of 1789, (5 Stat. So. Ca. 127.) It must be regarded now, as having the same validity as *lease and release*, and, it seems to me, for the very same reasons; for lease and release was, essentially, a bargain and sale under the statute of uses, and was introduced to evade the 27 Henry 8, requiring the enrolment. It is very certain that lease and release was the usual conveyance of land in South Carolina, previous to 1795, notwithstanding other conveyances were regarded as legally valid. Some doubts must have been entertained as to a bargain and sale, strictly so called, or its simplicity would have recommended it to general use, and would have obviated the necessity of the Act of 1795.[3]

I have said that lease and release was but a complicated form of bargain and sale. BLACKSTONE says, "a lease, or rather bargain and sale, on some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee; now this, without any enrolment, mades the

bargainor stand seized to the use of the bargainee, and vests in the bargainee the use of the term for a year, and the statute immediately annexes the possession. He, therefore, being in possession, is capable of receiving a release of the freehold, or reversion." Lease and release was supposed to have the advantage of feoffment, as there was supposed to be possession under it. Lease and release was effected by two deeds, one a bargain and sale, and the other a release, a sale by release. What has the Act of 1795 done, but reduce this mode of conveyance into one deed? There could not be a lease and release without a bargain and sale. This is the language of the Act of 1795: "*Whereas*, the mode of conveying land by lease and release, is expensive and inconvenient, &c.; be it enacted that the following form or purport of a release shall, to all intents and purposes, be valid and effectual to convey, from one person to another, the fee simple of any land or real estate, if the same shall be executed in the presence of and subscribed by two or more credible witnesses." The language of the form presented is, "have bargained, sold and released, and by these presents do bargain, sell and release." What does it amount to, but bargain and sale and release? It combines in it all the operative qualities of both; it includes in it bargain and sale; and to maintain that to write on a piece of paper "I, A B, do bargain and sell," would be good, but, when the word release is added, it would be bad, would be to say, the minor, which is included in the major, could be good where the major, which includes the minor, would be bad. In other words, a bargain and sale, isolated and alone, would be good, but where included in a deed of release, would be bad. I think the proposition cannot stand the test of scrutiny. The form prescribed by the Act, is a reduced form of bargain and sale, lease and release, and where any paper having these qualities, is intended to operate as a deed for the conveyance of freehold, it must have two subscribing witnesses. The paper before the Court has but one, and cannot

be supported as a deed. If such papers were allowed to operate as deeds, human vigilance could not guard against the mischiefs of clandestine and fraudulent conveyances. Courts should never throw down the barriers of security, which the law has wisely and judiciously constructed for the protection of property.

The Act of the Legislature does say that the form prescribed should not invalidate the forms heretofore in use in this State; that is, all Common Law modes of conveyance which were attended with notoriety and transmutation of possession from one to another. All other forms are excluded by the one presented.

Upon the whole, we are dissatisfied with the decision below, and order the nonsuit to be set aside. [In *Craig* v. *Pinson;* but motion dismissed in *Allston* v. *Thompson.*]

JOHNSON, GANTT, EVANS, JOHNSTON, EARLE, and DUNKIN, JJ., concurred.

O'NEAL, J., *dissenting.* In these cases, I have the misfortune to differ from a majority of the Court. That the deeds, at common law, are good as deeds of bargain and sale, without witnesses, is abundantly shown by the argument of Mr. Perry, to which I refer for a correct statement of the law. As I understand my brethren, I believe they do not deny this; but they contend that the form adopted by the Act of 1795, is, in substance, a *feoffamentum*, a bargain and sale and release, and that all deeds executed since, must have some of these requisites, and must of course, have two witnesses. With great respect and deference, I think this argument more specious than solid. It is true, the operative words of these several modes of conveyance, are to be found in the form prescribed by the Act. But, because it combines them all, it does not follow that it is any one of them. It is a new creation made out of them all, and when it is adopted, then, two witnesses are required. But notwithstanding the Act of 1795,

any one of the Common Law modes of conveyance may be resorted to, and there is nothing in the Act which reaches it; for the provision in the enacting clause declares that the form established by the Act was not to have the effect "to invalidate the forms heretofore in use in this State." This saved every interest arising from or by any other mode of conveyance.

It has been supposed that the recording Act of 1785,[4] must have some effect on the decision of this case. In one point of view, I admit, it has. Its plain words show that witnesses were not necessary to the validity of a deed. Writing, signing, and sealing, are the only three requisites to make it binding between the parties. Against purchasers without notice, recording is a fourth requisite. To admit such deed to record, it was required, by the Act of 1785, that it should be acknowledged by the grantor or grantors, or by proof of the signing, sealing and delivery, by the oath of two credible witnesses in open Court. The Act of 1788, (P. L. 453,)[5] altered this provision, and dispensed with the necessity of an acknowledgment of the grantor, or probate by the attending witnesses in open Court, and provided that an acknowledgment by the grantor or grantors, before a judge of the Supreme Court, or *oath of one witness*, before a magistrate out of court, swearing that the deed was duly executed, should be sufficient to admit the deed to record. These provisions, it is plain, do not affect the validity of the deed as between the parties. They are intended to prevent double conveyances; and it may be that a deed which could not be admitted to record, for want of proof, might not operate against a purchaser.

But let it be conceded that these provisions reach the deed as between the parties: what then? There is nothing in the Act of 1785, which speaks of attesting witnesses. If the deed was acknowledged in open Court by the grantor, or the facts of signing, sealing and delivering proved by two witnesses, it must go upon the record, whether there were or were not

subscribing witnesses. This would show that the deed must be good without witnesses. The Act of 1788 does speak of attesting witnesses; but, in the mode of proof adopted by it, it does not require proof by the subscribing witnesses: an "acknowledgment before a judge of the Supreme Court, or oath of one witness before a magistrate out of Court, swearing that the deed was duly and legally executed, as heretofore has been the practice to make proof," is all which it requires. In this Act, there is nothing to make subscribing witnesses necessary to the validity of a deed. For, admit that from its phraseology there must be a witness attesting the execution, does it follow that that witness must be a subscribing one? I think not; for a witness may attest a transaction and not make any memorandum of it.

But, if there must be a subscribing witness to a deed, how does it happen, in Craig's case, that the deed is to be adjudged void, when, in that case, there is a subscribing witness? But I hold that a deed not pursuing the form of the Act of 1795 is good between the parties without a subscribing witness.

I think, if understood rightly, that the opinion of some of the judges turned upon the usage of the country. That it is usual to have two witnesses to attest the execution of a deed and subscribe the memorandum of execution, is true beyond all doubt. But that usage is attached to and follows the form of the Act of 1795, and can therefore have no sort of effect. To say, however, that usage would render void a good common law conveyance, is giving to it the effect of a statute. That is going a step, and a very great step, beyond any thing that I have before heard ascribed to usage.

In the case of *Allston and others* v. *Thompson*, I think that the motion ought to be granted. In the case of *Craig* v. *Pinson*, I think the motion ought to be dismissed.[6]

Perry, for the motion, (in *Allston* v. *Thompson*.)

The plaintiffs claim under a deed from the Deputy Marshal

of the United States. The deed is *without subscribing witnesses*, and the plaintiffs were *nonsuited*. They offered to prove the execution of the deed, by witnesses who were acquainted with the hand-writing of the Deputy Marshal, and were not permitted by his Honor, the presiding Judge.

The principal question for the consideration of the Court in this case, is, whether a deed, executed without subscribing witnesses, be good and valid to pass lands in South Carolina. In determining this question, we must first consider whether the Act of 1795, "to facilitate the conveyance of real estates," renders null and void other forms of conveyance than that therein prescribed. Your Honors will perceive by reference to the Act, (2 Faust, 4, 5; 1 Brevard Dig. 176,) *that it does not*. The preamble states that "whereas the mode of conveying land by indentures of lease and release is expensive, and is found by many inhabitants of this State to be very inconvenient; for remedy thereof, be it enacted, &c., "that the following *form* or purport of a *release*, shall, to all intents and purposes, be valid and effectual to convey, &c., "if the same shall be executed in the presence of, and be subscribed by, two or more credible witnesses." Then follows the form, and in conclusion is the following *proviso:* "That this Act shall be so construed as not to oblige any person to insert the clause of manority," &c., "*or to invalidate the forms heretofore in use within this State.*" There can, then, be no doubt that this Act was passed to shorten and simplify the form of a conveyance of lands, without in any manner interfering with other modes in use at Common Law, or under the *Statute of Uses*. If the parties desire it, they may still resort to "*the forms heretofore in use within this State.*"

Let us then consider what forms of conveyance were in use prior to the Act of 1795, and whether witnesses were absolutely requisite to the validity of such forms. At Common Law, the forms of original conveyances were, "Feoffment," "Gift," "Grant," "Lease," "Exchange," and "Partition." And

under the Statute of Uses, there arose the "Covenant to stand seised to uses," "Bargain and Sale," and "Lease and Release." (See 2 Bla. Com. 310, 329, 338; 4 Cruise Dig. 43, 48, 88, 102.) It is probable, however, that the most usual forms of conveyance adopted in South Carolina, previous to 1795, were "Lease and Release," "Bargain and Sale," "Covenant to stand seised to uses," "Grant" and "Lease," for terms of years. These are the conveyances we most frequently meet on record, in the register of mesne conveyance office, until the statute "to facilitate the conveyance of real estate" was passed.

Witnesses were not necessary to any of these forms of conveyance. In support of this position the authorities are numerous and without contradiction either by comment, or decision in England or America. In 2 Bla. Com. 307, it is said "the last requisite to the validity of a deed, is the attestation or execution of it in the presence of witnesses; though this is necessary, rather *for preserving the evidence*, than for constituting the essence of the deed." In 4 Com. Dig. 378, (tit. *Fait*, B. 4,) it is laid down in broad terms, that witnesses are not essential to a deed; and several authorities are referred to, in support of this doctrine in the United States, by the Editor. (1 Serj. & Rawle, 72; 1 Haywood, 205.) In a note on the same page, it is stated that, "in the reign of Queen Elizabeth, deeds were often without winesses." In 4 Com. Dig. 36, it is said "The eighth and last circumstance necessary to a deed, is the attestation of it by witnesses; which is not a thing essential to a deed, itself, but only constitutes the evidence of its authenticity;"—and that "Deeds, in the reign of Queen Elizabeth, were often without witnesses. Mr. Justice Windham said he had seen several deeds, made in Queen Elizabeth's time, without witnesses." This, too, it will be remembered, was long after the Statute of Uses, and has reference, therefore, as well to deeds under the Statute, as to those at common law,—to deeds of bargin and sale, lease and relea e,

as to feoffments, grants, exchanges, &c. In 1 Phillipps on Evidence, 420, it is laid down that, "in cases where there is no subscribing witness on the deed, or where the subscribing witness denies having any knowledge of the execution," &c., "the execution may be proved by proving the handwriting of the party to the deed." In Perkins on Conveyancing, a book of high authority, as well as great learning of the common law, three things, and *only* three, are enumerated as "necessarily appertaining unto a deed; viz: writing, sealing, and delivery." This writer no where intimates that witnesses are essential to the validity of a deed. In two Campbell N. P. R. 636, Lawrence, J., says, "If the attesting witness swears he did not see the deed executed, I think it is then to be treated as if there were *no attesting witnesses*, and evidence of the handwriting of the party is sufficient proof of its execution." In a note to 2 Chitty's Blackstone, 248, the learned annotator says, "It is not essential to the validity of a deed, in general, that it should be executed in the presence of a witness." The requisites of a good deed are enumerated in LORD COKE'S 1st Institute, (lib. 1, c. 5, sec. 40,) and nothing is said of subscribing witnesses. Had witnesses been necessary to the validity of a deed, it would have been so laid down by this learned oracle of the common law. The words of LORD COKE are: "This word, *deed*, in the understanding of the common law, is an instrument written on parchment, or paper, whereunto ten things are necessarily incident; viz. 1 writing; 2, on parchment, or paper; 3, a person able to contract; 4, by a sufficient name; 5, a person able to be contracted with; 6, by a sufficient name; 7, a thing to be contracted for; 8, apt words required by law; 9, sealing; and 10, delivery."

It is manifest, then, that although the Act of 1796 requires two witnesses to the form therein prescribed for conveying lands, it does not invalidate, or interfere in any way with the forms in use at common law, or under the Statute of Uses;

and that witnesses are not necessary to the validity of a deed at common law, or under the Statute of Uses. It follows, then, as a necessary consequence, that the deed from the deputy marshal is good, *as such*, without witnesses: in other words,—that if it be perfect, in every other respect, to convey land in South Carolina, it will not be rendered invalid by the want of subscribing witnesses.

This leads us to consider whether the present deed is in accordance with the forms by which lands were conveyed at common law, and under the Statute of Uses. It will not be pretended that the deed now under consideration is deficient, unless for want of "apt words required by law." All the other requisites, enumerated by Lord Coke, it has.

What is understood in law, by "apt words" is, that the deed shall contain "words sufficient to specify the agreement, and bind the parties." (2 Bla. Com. 297.) "It is not absolutely necessary in law, to have all the formal parts that are usually laid down in deeds, so as there be sufficient words to declare clearly and legally the parties' meaning." (*Idem.* 298.) In 4 Cruise D. 24, it is laid down that the words of a deed "must be sufficient to specify the agreement and bind the parties, legally and orderly set forth; that is, there must be words sufficient to signify the terms and conditions of the agreement, and to bind the parties." There can be no doubt that the present deed is a good one according to these rules. It does contain "words sufficient to specify the agreement," "to declare clearly and legally the parties' meaning," to "signify the terms and conditions of the agreement, and to bind the parties." But I can go further than this, and may, with propriety, say that the deed before the Court contains exactly the "formal and orderly parts" mentioned by Cruise and Blackstone. They are eight, viz., premises, *habendum*, *tenendum*, *reddendum*, condition, warranty, covenants and conclusion. A deed may or may not contain all these formal and orderly parts, as the parties may determine. For instance, the clause

of warranty may be inserted, or left out. So may the *reddendum*, the condition and the covenants. (2 Bla. Com. 299 and 304.) The deed now under consideration does contain the premises, *habendum*, *tenendum* and conclusion, which was all it should contain; for the marshal could make no warranty, there was no condition annexed, and nothing reserved.

If your Honors will refer to the old form of feoffment in 2 Bla. Com. *App.*, it will be seen that the present deed is very much after that form, with the exception of the memorandum of livery of seisin endorsed on the feoffment. The form prescribed by the Act of 1796, is called, in that Act, "a form or purport of a release." The present deed is not very dissimilar to that form, and may, with the same propriety, be termed a release. But there can be no doubt that, as a form of *bargain and sale*, it is a good one. "A deed may be good, though it has not formal parts," (4 Com. D. tit. *Fait*, E, 1.) The words bargain, and sell, are not necessary to be contained in the deed to make it a good conveyance by bargain and sale. The words, "alien and grant," will be as good; and so will the words, "covenant to stand seized to the use of," or "granted, demised, set and to farm let," (4 Cruise D. 89.)

Now, if the deed from the marshal is in accordance with the forms of conveyance, at common law and under the Statute of Uses, adopted in South Carolina before 1795, then it is a good deed, and is capable of passing land, notwithstanding the Act requiring two witnesses, and prescribing the form of conveyance.

I will now notice the objection, that there was no livery of seisin accompanying this deed, without which no freehold estates could be conveyed at common law. However true the objection may be to deeds at *common law*, it has no application to those deeds of bargain and sale, lease and release, which have arisen under the Statute of Uses. Livery of seisin is not necessary in those deeds, and has been dispensed with by St. 27 Hen. 8, c. 10, transferring the posses-

sion to the use. The words of this statute are, "Be it enacted that, where any person or persons," &c., "shall happen to be seized," &c., "of any lands and tenements," &c., "to the use, confidence or trust, of any other person," &c., "by reason of any bargain, sale, feoffment," &c., "in every such case, all such persons," &c., "that have, or shall hereafter have, any such use, confidence," &c., "shall from henceforth stand and be seized, deemed and adjudged, in lawful seizin," &c., "of and in the same," &c. In commenting on this statute, Blackstone says, that "where a man covenants to stand seized of lands to the use of his child, the statute executes, at once, the estate; for the child, having acquired the use, is thereby put, at once, into corporeal possession of the land, without ever seeing it, by a kind of parliamentary magic." And, again, in speaking of bargain and sale, he says, "and the same is said of conveyance by lease and release." (2 Com. 338, 9.) "These are held," says the commentator, "to supply the place of livery of seizin; and so, a conveyance by lease and release, is said to amount to a feoffment." In Co. Lit. 48, note 3, it is said, "but since the introduction of uses and trusts, and the Statute of 27 H. 8, for transferring the possession to the use, the necessity of livery of seizin for passing a *freehold* in corporeal hereditaments, has been almost totally superseded, and, in consequence of it, the conveyance by feoffment is now very little in use." "Before the Statute of Uses, equitable estates of freehold might be created through the medium of trusts without livery; and, by the operation of the statute, legal estates of freeholds may now be created in the same way."

I hope I have now shown that livery of seizin was not necessary to convey the lands called for in the deed under consideration; that this deed, being under the Statute of Uses, is good as a release, or bargain and sale, without livery of seizin. But I would further contend, if it were necessary, that it is a good deed, as a feoffment, although no livery of seizin be en-

dorsed upon it. Livery of seizin may be presumed in law and equity, and should be, in this case. I refer to 12 Petersdorff's Abridg. 336. "A memorandum that livery of seizin was given, is *usually* endorsed on all ancient feoffments, but Courts of Law and Equity will presume livery of seizin to have been given, though not endorsed on the deed, when the possession has gone according to the feoffment for a length of time. A Court of Equity will supply the want of livery of seizin, when a feoffment appears to have been made for a good or valuable consideration." In 1 Bay R. 107, there is a case decided very similar to the present one. It was decided in 1790, five years before our statute prescribing the form of a conveyance now in use. In that case, a deed had been executed, similar to the present one; and it was decided that a "bargain and sale is a good conveyance, under the Statute of Uses, to pass a fee, although no livery of seizin be made; so is a covenant to stand seized to bargainee's use." Judge Waties, in delivering the opinion of the Court, says, "What shall be the effect of this deed, as a feoffment, bargain and sale, or covenant to stand seized? It would, perhaps, require much refinement to make it a good feoffment. Possession in deed, acquired in any way, might operate as a good livery of seizin under it, and, with the possession, it would be a good title." (There was no possession in that case.) "But there is no need at all of a strained construction to make this a good deed. I consider it as a good bargain and sale. The consideration, in part, was executed, and is acknowledged on the face of the deed. The terms of it show a plain intent to pass the estate. The deed, therefore, must stand," &c. In a note to this case, the reporter says, "By an Act of the Legislature, since the determination of this case, a bargain and sale is declared to be a good deed to pass a fee, in all cases, without livery of seizin."

It would seem, from the above decision, that the Act of 1795 is nothing more than a declaratory Act, with the addi-

tion of the subscribing witnesses. The same deed of bargain and sale that would now pass lands under this statute, with subscribing witnesses, would have passed the same lands, before the enactment, without witnesses, and may *still* pass them without subscribing witnesses. This was not, perhaps, the first declaratory Act passed by our Legislature; nor has it been the last. In 1824, an Act was passed, declaring "that no words of limitation shall, hereafter, be necessary to convey an estate in fee simple, by devise," &c. In 4 M'C. Rep., 442, 476, the Court decided that the law was as declared in this Act, before the passing of the same, and that it was only declaratory.

There is another argument in support of this deed, that might be urged. It is that the conveyance was made under an Act of Congress, and, although it may not be in conformity with the forms adopted in this State, it may yet be good. The Act of Congress is general, to all the marshals in the different States, requiring them to advertise and sell the lands that the owners had not paid the direct tax for, and directs them to make title to the lands they sell; but no form of conveyance is prescribed. The local laws of a State are not to control a constitutional law of Congress. If the deed be good under the Act of Congress, it must be valid under our State laws, no matter what be its form.

But it may be submitted whether any title at all be necessary to sustain this action. The deed of the marshal is not conclusive of sale. The action may be sustained by proving the assessment, sale, &c., without any deed.

[1] 5 Stat. 255. *An.*
[2] Not made of force here. *An.*
[3] See 1 Rich. 164, and note. *An.*
[4] County Court Act, § 45; 7 Stat. 232. *An.*
[5] 7 Stat. 247. *An.*
[6] See 1 McM. 376; 4 Rich. 79; 6 Rich. 239. *An.*
[7] 5 Stat. 255. *An.*
[8] 2 Stat. 466. *An.*
[9] 6 Stat. 237, § 1. *An.*

The STATE, *ex rel.* E. B. BRONSON, *v.* M. W. HUNTER.

The term of office of *Ordinaries* is subject to be limited by Act of the Legislature, and is now limited, by Act of Assembly, 1833, to four years.

Before O'NEALL, J., at Darlington, Spring Term, 1840.

This was an application for a *quo warranto.*

After the respondent, elected since passage of the A. A., 1833, (p. 60,)[1] had held for four years, an election took place, and the relator was duly returned. But the respondent refused to give up the office, alleging that his tenure was during good behavior.

The Court granted the order for the writ; supporting its judgment by an able argument, which is only omitted because its reasonings are embodied in the subsequent opinion of the Appeal Court, upon the motion of the respondent to reverse the order of the Court below.

Curia, per JOHNSON, Ch. The question submitted to the consideration of the Court is, whether an Ordinary is entitled to hold his office during good behavior, or for four years only, to which it is limited by the Act of 1833.

The very clear view in which Mr. Justice O'Neall, who heard the cause on circuit, has, in his report, presented the question, and the very satisfactory conclusion at which he has arrived, would seem to supercede the necessity of adding more than our entire concurrence. The zeal and confidence, however, with which the appeal has been prosecuted, has given it a consequence which calls for the deliberate judgment of the Court, although we may not be able to add any force or strength to the argument contained in the report.

In 1812, (see Acts of that year, p. 35,)[2] the Legislature passed an Act by which the office of Ordinary was limited to the term of four years. Before that time, the Ordinaries held their offices during good behavior, and were elected by the Legislature. But in 1815, (see Acts, p. 55,)[3] the Legisla-

ture, by Act, conferred on the people the power of electing the Ordinary, and prescribing the time, place and manner of holding the elections. The case of *Hays, relator*, v. *Harley*, (1 Mills' Const. Rep. 267,) decided in 1817, grew out of these Acts, and it was held by the Court that the Ordinary was a Judge of an inferior court, and entitled, under the Constitution of 1790, to hold his office during good behavior; and therefore the Act of 1812, limiting the term of office to four years, was void. The amendment of the Constitution,[4] finally adopted in 1828, followed. That provides that all "civil officers whose *authority* is limited to a single election district, a single judicial district, or part of either, shall be appointed and hold their office," &c., "in such manner as the Legislature, previous to their appointment, may provide."

Whatever doubts severe criticism may elicit, from the terms employed in this amendment, as to the intention of the Legislature that adopted it—there is no matter of judicial or legislative history better known, than that it grew out of the decision of the Court, in *Hays* v. *Harley*, and some other cases, of the same character, about the same time, and that the leading object was to enable the Legislature to impose such limitation, on the term of the office of Ordinary, as might be thought expedient. A recurrence to the state of legislation, in relation to civil officers whose powers were limited to the district for which they were appointed, at the time the amendment was adopted, leads irresistibly to the same conclusion. Before that, the Legislature had unlimited power as to the mode of appointment and term of office of every district officer, except the Ordinary and Sheriff, whose term of office was limited to four years by the Constitution of 1790; and it cannot be supposed, the term "all civil officers," would have been employed, if it had been intended to provide only for the case of the Sheriff, and they could apply to no other than the Ordinary. The Act of 1833, limiting the term of office to four years, and the universal acquiescence in it, ever since,

supplies a legislative construction, and the approbation of the community.

Now I do not intend to insist that this is conclusive: that the intention to do an act, however clear and manifest, would stamp on the act itself a different character from that which it obviously imports: but there is nothing, in the whole circle of human affairs, so well calculated to lead to a correct understanding of a doubtful and equivocal act, as a knowledge of the object and aim. It is put in requisition in the daily intercourse of men, and is employed as the means of ascertaining the true interpretation of all contracts, compacts, laws and constitutions, as well those relating to the most trivial, as to the most important and solemn subjects.

Having premise thus much, let us examine the amendment, to ascertain whether it does or does not authorize the Legislature to limit the term of office of the Ordinary.

The advocates of this appeal insist on the negative; and they maintain, 1. That the powers of the Ordinary are purely judicial, and, therefore, he does not fall within the description "civil officers, whose authority," &c.; the term, *authority*, referring to ministerial and not judicial powers. 2. That he does not come within the description of "civil officers whose authority is limited to a single election district, or judicial district," &c.; because his authority extends beyond the district for which he is appointed. 3. That the authority, conferred on the Legislature, is to provide for the *manner* of appointing and holding the office, and not for limiting the term of office.

The first proposition is, I think, very fully and fairly met in the report of the Circuit Judge. If, as I have already shown, the object of the amendment was to put it in the power of the Legislature to limit the term of office of the Ordinary, the word "authority" would be idle, unless it means jurisdiction or judicial power; for he exercises no other. That, too, is its grammatical sense. Du Ponceau, in his treatise on

Jurisdiction, (p. 21,) says that jurisdiction, in its general sense, is the power to make, declare and apply the law. When confined to the judiciary department, it is what we denominate *judicial power*, and, according to the lexicographers, the term "authority" is often used to express "legal power." (Johnson's Dic., *quarto ed.*) In the Act of 1799,[5] which provides for the establishment of the Courts of Ordinary, and to which I shall have occasion to refer more particularly, we have an example, where the word "powers" is used as a substitute for "jurisdiction," as applied to the Ordinary, in which it is provided that he shall exercise "all the *powers* of the Court of Ordinary." So that, when applied to the judiciary department, the terms "jurisdiction," "power" and "authority," all mean precisely the same thing.

The Act of 1799 is, in itself, a decisive refutation of the second proposition. By that, (after providing for the establishment of Courts of Ordinary in each district,) it is declared "that the judges of the said Courts of Ordinary shall be chosen by joint ballot of the two houses of the Legislature, which judges shall administer, each in the respective district for which he shall be appointed, all the powers of the Court of Ordinary.

Now, it is not pretended that the Ordinary has jurisdiction of causes arising, or of persons residing, without the limits of his district; and the only examples given of his *authority* extending beyond it, are the powers given him, by the Act of 1799, to enforce the attendance of witnesses, (which, although not expressed, may be fairly construed to extend beyond the district,) the power to compel the production of wills that have been suppressed, and a few others of like character. But these incidents are accessories to, and not in themselves, substantial judicial powers. They could not be exercised, unless there existed a cause, of which the Ordinary had jurisdiction, and the jurisdiction would, itself, be a nullity, if there was no authority to enforce the attendance of witnesses to procure testimony. In short, without it, there

could be no such thing as a local limited jurisdiction. The jurisdiction of the Court of Admiralty is limited to causes arising on the high seas: that of the District Courts of the United States, to the State in which they are held; yet they may collect evidence from all quarters; their judgments and decrees are evidence everywhere, and the operation of their final process, unless otherwise provided, runs throughout the whole extent of the State or kingdom in which they are established; and no one ever yet supposed that their judicial powers were thus extensive.

The third proposition has more plausibility. "Shall be appointed and hold their office," &c., "in such manner as the Legislature may provide," does not necessarily impart the power to regulate the term of office, but rather the *manner* of appointment. In its grammatical construction, however, it refers to both. Now, that the office itself has the right to exercise its powers, and to enjoy its emoluments, is an abstraction which is inaccessible to the physical senses; and to suppose that it was intended, by the amendment, to authorize the Legislature to prescribe the manner of holding it, is irreconcileable with common sense. That it could not have been intended to apply to the mere formula connected with the office is obvious, for over that the Legislature had ample powers. Something else must, therefore, have been intended.

We have before seen that the limitation of the term of office of Ordinary was the leading object of the amendment, of which subsequent legislation and public acquiescence are an imposing construction; that, without that construction, all the leading objects of the amendment must fail; and we have no room to doubt, however inappropriate the term used, it was intended to authorize the Legislature to limit the term of office of the Ordinary.

The motion must therefore be dismissed.

The whole Court concurred.

[1] 6 Stat. 484. *An.* [2] 5 Stat. 674. *An.* [3] 6 Stat. 11. *An.*
[4] 1 Stat. 196. *An.* [5] 7 Stat. 294, § 8, 9. *An.*

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ABATEMENT (by Death.) See *Practice*, 1.

ACCEPTANCE. See *Bills*, 3.

ACTION, FORM OF.

1. Plaintiff baked certain bread, under directions to go on baking until ordered to stop, and told the defendant his bread was ready; the latter refused to take it, saying he did not want it then. The plaintiff's remedy was damages for breach of contract, not an action for goods sold and delivered; and his book entries were not admissible in evidence. *Miller* v. *Hilliard & Wade* 149
2. But if there had been a delivery and acceptance, under a similar order, in a previous transaction not yet settled, that might perhaps constitute a constructive delivery ..... *Ib.*
3. A parent has no action for an assault and battery on his child. *Heast* v. *Sybert* 171
4. Trespass *vi et armis* is the proper remedy for a levy under a warrant avoided by the landlord's death, or under a pretence of authority in his administrator. *Bagwell* v. *Jamison* 249

ACQUIESCENCE.

1. The acquiescence, in a trespass, of one who has been deceived by a pretence of legal authority, is not such consent as to affect his remedy at law. *Bagwell* v. *Jamison* 249
2. Payment to the Sheriff, upon service (without actual levy) of an execution void for defect of jurisdiction, is not a voluntary payment. *Murray* v. *Moorer* 111

ADMINISTRATOR. See *Executors and Administrators.*

ADVERTISEMENT. See *Debtor*, 7.

AGREEMENT.

1. Bond, to "keep up and in good repair," a certain bridge, for seven years, "and fully indemnify and save harmless," the Commissioners for Roads for any injury, loss, &c., they might sustain by its deficiency. The obligor was liable for neglect to repair, which occasioned expense *after*, although not during the term. *Commissioners of Roads* v. *Austin* 180
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1. An assignment by Orphan House Commissioners, of the indentures of an apprentice, did not imply a covenant that the apprentice should perform the stipulations contained in them. *Commissioners of Orphan House* v. *Magill*..... 56
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1. The oath upon which a Magistrate issues an attachment, though it need not be *taken* in writing, must be recited in the writ. *Devall* v. *Taylor*..... 5
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3. An affidavit that defendant "is *about* to remove out of the State personally," will not sustain a domestic attachment. *Ibid.*

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1. The holder, in his action against the acceptor of a bill of exchange, failing to prove the handwriting of the first indorser, was nonsuited. *MacFarlane* v. *Moses*..... 54
2. "Promise to pay as soon as I am in possession of funds to do so, from the estate of B.," is not a promissory note within the statute. (But *otherwise*, it seems, if the promise had been unconditional, though a particular fund was designated.) *Wiggins* v. *Vaught*..... 91
3. A merchant agreed with the payee of a bill, who promised that

certain produce of the drawer's, whose agent he was, should be sent to him, that he would honor his draft on that condition. The produce was not sent till after the bill had been dishonored and protested, and then only a part, with instructions from the owner to devote the proceeds to other purposes. The payee was nonsuited in his action against the merchant, both as acceptor and for money had and received. *Hickman's ex'or* v. *King & Co*..... 132

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1. A coat, ordered by a customer resident abroad, without instructions as to the mode of conveyance, was sent through the stage coach by the tailor, who paid the freight. The coat being lost in transitu, the vendor had his action against the carrier. *Goodwin, Harrington & Co.* v. *Douglass*..... 174
2. "Where it appears that the goods were delivered at the risk of the vendor, he must bear the loss, if any ensue, and, in general, where he pays the freight, and voluntarily takes on himself the selection of the carrier and mode of conveyance, he must stand to the risk. Where the mode of conveyance is indicated by the vendee, and he is to pay the freight, the converse of the proposition is true, and he will be regarded as having had a constructive delivery made to him from the time the goods are put into the custody of the master or carrier."—*Butler, J*..... *Ib.*
3. "I do not see why the defendant should object to the plaintiff's action, as it is evident he is liable to some one. The judgment in this case will be a satisfaction of the demand against him."—*Id*..... *Ib.*

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1. A promissory note to the mother of a child who has been beaten, in consideration of not prosecuting, is void. For a parent has no action for an assault and battery on his child. And the note to the mother will not be considered to be for the child's benefit. *Heast* v. *Sybert*, 171
2. A warranty of soundness given after the completion of a sale, being *under seal*, could not be impeached for want of consideration. *Wilson* v. *Ferguson*..... 100

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DAMAGES.

1. In case of eviction, the measure of damages, on the covenant or warrantry, is the purchase money with interest from the date of the purchase.

"There is no case of eviction actually or constructively, by *paramount title*, where the party's right to interest could be defeated by the reception of the rents and profits."—*O'Neall, J. Earle* v. *Middleton*..... 127

2. The measure of a verdict for breach of contract should be the damage that the injured party may reasonably have incurred. And the Court will not restrain the discretion of the jury unless it clearly exceeds this limit. *Miller* v. *Hilliard & Wade*..... 149

3. Some months after sale, the purchaser told the seller "he wished to give up the negroes on account of unsoundness," (the negroes not being present.) This was no sufficient tender to rescind the bargain and entitle the buyer to the whole purchase money as damages. *Wilson* v. *Ferguson*..... 190

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1. A commissioner of special bail has no discretion to discharge, under the Prison Bounds Act, one who is *accused* of fraud, &c. He is imperatively required to refer that accusation to a jury. *Arrants* v. *Dunlap*..... 27

2. The distinction formerly existing in regard to the judicial authority of the Commissioner of special bail in cases of arrest on *mesne* and on *final* process, (2 Hill, 433,) is done away by the Act of 1833..... *Ib.*

3. An assignment, by letter, of goods, to indemnify one who had paid money as security, was good against creditors attaching before the letter was received or the assignment accepted, and took effect from its date. *Dargan* v. *Richardson*..... 197

4. A debtor inclosed notes, &c., to one of his creditors, by letter, with directions to satisfy first his own debt, then those of other creditors designated by name. This was a good assignment, as against other attaching creditors, for the benefit of the creditors named. *Shuber & Bunting* v. *Wiading*..... 218

5. Application for relief under the Prison Bounds Act, being resisted on the grounds that defendant's schedule was false, and that an assignment (mentioned in the schedule) of part of his effects, was false and fraudulent; the jury found the *assignment* false and fraudulent. *Held*, that this was not such conviction of rendering a *false schedule*, as thereafter to exclude the defendant from the benefit of that Act and the Insolvent Debtors' Act. *Cavan* v. *Dunlap*..... 241

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in which the verdict of fraudulent assignment had been found, was satisfied. *Caran* v. *Dunlap*..... 241

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1. A sheriff's deed under an execution, which should have conveyed the land of an intestate, but by mistake purported to convey that of his administrator, was not permitted to pass the land of the intestate. *Murphy* v. *Price*..... 14

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1. The note of plaintiff, payable to *one* of two joint defendants, was not allowed to discount to an action on their joint note. *Kennedy* v. *Cunningham*..... 50

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3. Damage in *transitu* is a good set-off to an action for freight. *Manning* v. *Watson*..... 60

4. And delivery to, and acceptance by the consignee, does not alter the case. (*Semble.*)..... *Ib.*

5. Any demand of the defendant, arising *ex contractu*, may be pleaded in discount; but not damages *ex delicto*..... *Ib.*

6. In an action for the purchase money of a lot purchased after the railroad had been constructed through it, a previous agreement in writing, not under seal, by the vendor, to convey to the Company a space through of fifty feet, if necessary, and the power to clear a hundred feet on each side, was not allowed to be set up in discount. Such an agreement was not a covenant for the conveyance of the fee; but only of an easement, or right of way. *Williams* v. *Oliver*... 115

7. In discount to an action for the purchase money of land, the defendant must make out a valid, subsisting, outstanding, paramount title in another. An agreement to convey a part of the land (or, it seems, even a formal conveyance, if not duly recorded,) will not do..... *Ib.*

8. An incumbrance of which the purchaser had notice could not be discounted against the purchase money. *Williams* v. *Oliver*..... 115
9. Defendant in assumpsit, offered in discount the value of a quantity of yarn, delivered to the plaintiff, more than he was entitled to, by mistake and without plaintiff's knowledge. *Held*, that the discount could not be admitted. *Brougham* v. *Dyson*..... 208

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1. Levy, under a distress warrant, some months after the death of the landlord who had issued it, was a trespass; for the warrant was but a power of attorney, which expired *eo instanti* with the principal's death. *Bagwell* v. *Jamison*..... 249
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1. The District Election Act of 1815, is not absolutely repealed by that of 1839, and was the proper law to govern an election held, after the passage of the new Act, to fill a vacancy which had occurred before it. *The State ex rel. Fox* v. *Harmon*..... 265
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1. Defendant, in trespass claimed as tenant of S., and adduced evidence to his tenancy and to S.'s title; but, was proved to have entered as plaintiff's tenant, and was, therefore, evicted. This did not conclude him, after having regained possession, from holding under the title of S. *Jones* v. *Muldrow et al*..... 254

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EVIDENCE.

1. The holder, in his action against the acceptor of a bill of exchange, failing to prove the handwriting of the first indorser, was nonsuited. *MacFarlane* v. *Moses*..... 54
2. A deed thirty-five years old was allowed to go to the jury as evidence, upon proof of the handwriting of the two subscribing witnesses, who were dead, and of its having been duly registered in the proper office. *Edmondston et al.* v. *Hughes*..... 81

3. After proof of the signatures of the subscribing witnesses, who are dead, "it would seem, that it is not necessary to prove the grantor's handwriting; for his signature, seal and delivery are proved when the handwriting of the witnesses is proved. But it is usual to prove his handwriting, and where it can be done, it is safest and best to do it."—(*O'Neall, J.*) *Edmonston et ux.* v. *Hughes*..... 81

4. Upon evidence that an ancient deed had been legally proved before a justice of the peace, and registered; "If there were no other circumstance in this case, I should say that that warranted the judge in sending a deed, thirty-five years old, to the jury."—*Id.*..... *Ib.*

5. A copy of the newspaper in which a libel was published, with proof of defendant's acknowledgment that he had handed it to the editor for insertion, was proper evidence of publication. *Woodburn* v. *Miller*..... 194

6. Defendant, in libel, had charged the plaintiff with having falsely accused him of crime. On trial, defendant gave proof, in mitigation, of the falsehood of the accusation; plaintiff was entitled to reply with evidence of its truth..... *Ib.*

7. In an action on the case for obstruction of a private way, a verdict of damages for the plaintiff, determines the right of way as against the defendant, and is conclusive evidence of it in a subsequent action between the same parties. *Prather* v. *Owens*..... 236

8. *Quære*, whether so much of 11 Geo. 2, c. 19, is of force here, as provides that defendants entitled to rent may give special matter in evidence under the general issue. *Bagwell* v. *Jamison*..... 249

9. In trespass against a bailiff, for levying under a distress warrant alleged to be void, defendant justified by plaintiff's admissions that rent was due. Acknowledgments by the landlord, (deceased,) of partial satisfaction, were admitted in reply..... *Ib.*

10. Where it did not fully appear, by the record, what was the precise issue submitted to the jury, other evidence was admitted for the purpose of ascertaining the scope of their verdict. *Jones* v. *Muldrow et al*..... 254

11. A written warranty cannot be limited by parol evidence, (as, of the purchaser's knowledge of a defect,) unless unintelligible without it. *Stucky* v. *Clyburn*..... 186

See *Slave*, 1; *Witness*, 4, 5, 6, 7; *Malicious prosecution*, 1; *Negro Laws*, 1.

EXECUTORS AND ADMINISTRATORS.

1. Executors and administrators may not distrain for rent due at the death of their testator or intestate. The stat. 32 Hen. 8, c. 37, to the contrary, not of force here. *Bagwell* v. *Jamison*..... 249

2. Avowry by an administratrix for rent in arrear, set forth the demise under which the tenant held, made in her own name after her intestate's death. *Held*, that no further title need be shown, and a verdict for the avowant was right. *Morehead* v. *Barrett*..... 99

EXEMPTIONS.

See *Jury; Roads, &c.*, 2, 5, 6, 9, 10.

FEMALE, (Bail of.)

See *Bail*, 1, 2.

FISHERY.

1. Occupation of a spot for five or six weeks annually, as a fishing place, is not possession sufficient for the statute of limitations. *Jackson* v. *Lewis et al*..... 259
2. Defendant, in trespass for a fishery, under the plea of *liberum tenementum* showed a title in common with G., but plaintiff proved an elder title. G.'s testimony was then offered to prove defendant's right by prescription to fish—objected to for interest, as tenant in common, but held competent..... *Ib.*

FOREIGN JUDGMENT. See *Justice of the Peace*, 2, 3, 4.

FRAUD. See *Debtor*, 1.

FRAUDS, STATUTE OF.

1. An entry in a broker's sale book, with the consent of both parties, of the terms of an agreement for the sale of land, if not in itself a sufficient memorandum under the statute of frauds, may be so connected with a subsequent letter from the vendor, in reference to it, as to make it good against him. *Toomer* v. *Dawson*..... 68
2. "I am, however, far from conceding that the memorandum made by the direction of one party, and acquiesced in by the other, was not sufficient to bind both."—(*Butler, J.*)..... *Ib.*

HIRED SLAVES. See *Roads, &c.*, 1, 2, 3.

HUSBAND AND WIFE.

1. Upon a joint indictment, under A. A. 1740, sec. 37, (P. L. 173,) against husband and wife, the former was acquitted, and the latter convicted and fined. The husband was held not to be liable for the penalty imposed on his wife. *The State* v. *Montgomery et ux*..... 120
2. Where a settlement of real estate was made to the use of husband and wife, during their joint lives, then to the use of the survivor for life, with limitations over, the surviving widow took a freehold estate for life. *Cleary* v. *McDowall et al*..... 139
3. Where a woman, seized of a freehold in land for life, married, and during the coverture the land was levied on, and sold under an execution against the husband, who afterwards died, the widow surviving; *Held* that the purchaser only took an estate for the life of the husband, and at his death, the widow was entitled to the remainder of her estate..... *Ib.*

See *Pleading*, 12, 13.

INDICTMENT.

1. Two distinct offences, with different penalties, may be charged in the same indictment; but care must be taken to have the verdict framed so as to secure the several counts. *The State* v. *Priester*..... 103

See *Negro Laws*, 2, 3, 4.

2. An indictment for stealing twenty-five head of cattle, (against A. A. 1789—having been sustained only by evidence of a less number, and the jury having found a general verdict of guilty, a new trial was ordered. *The State* v. *Windham*..... 75

3. If the objection had been made in time, the Circuit Judge, (*Butler, J.*,) would have sent the jury back to amend their verdict. *The State* v. *Windham*..... 75

See *Disfiguring—Husband and Wife*, 1; *Misnomer*, 1, 2.

INSOLVENT DEBTOR. See *Debtor.*

INTEREST. See *Damages*, 1;—on money had and received, *Pleading*, 17, 18.

JOINDER. See *Husband and Wife* 1; *Indictment*, 1; *Negro Laws*, 2, 3.

JURISDICTION.

1. Plaintiff in sum. pro., having sustained his whole claim *prima facie*, defendant's testimony reduced it to fifteen dollars, and the judge decreed for the plaintiff to that amount. Decree reversed and non-suit ordered. *Sanders* v. *Gage, ex'r*..... 165

See *Justice of the Peace*, 1.

JURY.

1. A commissioned officer in the United States Navy, is not exempt from jury service. *The State* v. *Ingraham*..... 78
2. All previously existing exemptions are virtually repealed by the *Jury Law* of 1799..... *Ib.*

JUSTICE OF THE PEACE.

1. Proceedings before an inferior Court are void, unless they carry upon their face the evidence of jurisdiction; and, therefore, the oath upon which a magistrate issues an attachment, though it need not be *taken* in writing, must be recited in the writ. *Devall* v. *Taylor*.. 5
2. The judgment of a Justice's Court of another State is entitled to "full faith and credit" here, as a judicial proceeding, and is a good ground of action. *Lawrence* v. *Gaultney*..... 7
3. But, as its authentication is not provided for by the Acts of Congress, it must be proven on Common Law principles..... *Ib.*
4. How such a judgment may be most conveniently proven..... *Ib.*
5. A Justice of the Peace has no authority to issue a writ of *capias ad satisfaciendum*. *The State ex rel. Lark et al.* v. *Cureton*..... 235

See *Attachment.*

LANDLORD AVD TENANT.

1. Avowry, by an administratrix, for rent in arrear, set forth the demise under which the tenant held, made in her own name after her intestate's death. Held that no further title need be shown, and a verdict for the avowant was right. *Morehead* v. *Barrett*..... 99
2. A landlord is not bound to set out, in his avowry for rent in arrear, any further title than the lease under which his tenant entered and held the premises..... *Ib.*
3. The Statute 11 Geo. II. c. 19, though not expressly made of force in this State, has been adopted in practice..... *Ib.*
4. The possession of a tenant holding under an ancestor, inures to the the heir, and constitutes a continuous possession for his benefit. *Williams et ux.* v. *McAliley*..... 200

6. The tenant of a landlord who died before completing his title by possession, cannot hold adversely to his landlord's infant heir, either by taking out a grant to himself, or by attorning to another. *Williams et ux.* v. *McAliley*..... 200
6. *Quære*, whether so much of Stat. 11 Geo. II. c. 19, is of force here as provides that defendants entitled to rent, may give special matter in evidence under the general issue. *Bagwell* v. *Jamison*..... 249
7. In trespass against a bailiff, for levying under a distress warrant alleged to be void, defendant justified by plaintiff's admissions that rent was due. Acknowledgments by the landlord, (deceased,) of partial satisfaction, were admitted in reply..... *Ib.*

See *Estoppel*, 1; *Limitations, Stat. of*, 5, 6.

LIBEL.

1. "A report has gone abroad, through the instrumentality of S. W., stating that R. M. had a load or parcel of falsely packed or plated cotton bales; which report is a direct falsehood." This, printed and published, with malice, was a libel. *Woodburn* v. *Miller*..... 194

See *Evidence*, 5, 6.

LIMITATIONS, (STATUTE OF.)

1. Assumpsit against an Attorney for negligent delay whereby a debt was lost, though brought as soon as the loss could be definitely ascertained, was barred by the statute of limitations; the actual neglect and circumstances of the debtor which rendered the loss probable, having existed four years previous. *Ex'rs of Thomas* v. *Ex'rs of Irvin*..... 22
2. And the damage subsequently accruing did not constitute a fresh cause of action..... *Ib.*
3. Defendant's admission that "he was willing to settle, and to pay anything that might be due on a fair settlement; but he thought he had paid plaintiff enough," did not prevent the bar of the statute of limitations. *Hughes* v. *Hughes*..... 33
4. The purchase of one's land at Sheriff's sale, with an agreement that he shall remain in possession and refund the money at an indefinite period, does not create a *continuing trust* to bar the statute of limitations..... *Ib.*
5. The possession of an heir, in land, attaches to and is continuous with that of his ancestor, for the purposes of the statute of limitations. *Williams et ux.* v. *McAliley*..... 200
6. The possession of a tenant, holding under an ancestor, inures to the heir, and constitutes a continuous possession for his benefit..... *Ib.*
7. The tenant of a landlord who died before completing his title by possession, cannot hold adversely to his landlord's infant heir, either by taking out a grant to himself, or by attorning to another..... *Ib.*
8. Plaintiff in trespass, a minor, had acquired a title, by possession of part of a tract, with color of title to the whole; but, before her statutory right was matured, the defendant, also with color of title, had settled on part of the same tract, and kept possession for many years. Defendant's title was good to the extent of his actual occu-

pation, before the maturity of plaintiff's right; for it is the *right*, and not the unauthorized possession of a minor, that is protected from the operations of the statute of limitations. *Williams et ux.* v. *McAliley* 200

9. Occupation of a spot for five or six weeks annually, as a fishing place, is not possession sufficient for the statute of limitations. *Jackson* v. *Miles et al*..... 259

MAGISTRATE. See *Justice of the Peace; Attachment.*

MALICIOUS PROSECUTION.

1. A "true bill" found, constitutes a presumption of probable cause for the prosecution, and a plaintiff in an action for malicious prosecution, who had proved his general good character and defendant's malice, was yet nonsuited for want of express evidence to rebut this presumption. *Brown* v. *Griffin*..... 32

See *Pleading*, 1, 2.

MILITIA LAWS.

1. Where a militia execution (under the A. A. 1835, p. 18,) directed the Sheriff to levy a certain *per centage* on the general tax of a delinquent, the Sheriff was bound to ascertain the amount and collect it. *Seastrunk* v. *Rice*..... 71

2. The Sheriff is not entitled to any fee on a militia execution, under the A. A. 1835, except where the fine has been collected..... *Ib.*

MINOR. See *Limitations, Stat. of*, 8.

MISNOMER.

1. After a prisoner has pleaded not guilty, he may not avail himself of misnomer in the indictment, either on his trial, or in arrest of judgment, or on motion for a new trial. *The State* v. *Thompson*..... 31

2. An indictment (under A. A. 1817 and 1834,) for selling liquor to the slave of William Patton, charged the selling to have been without "a written order of or from the said William *Boice*," (instead of *Patton, the owner*,) "or of or from any other person having charge or management of said slave." After verdict of conviction, judgment was arrested. *The State* v. *Boice*..... 77

MONEY HAD AND RECEIVED. See *Bill of Exchange*, 3; *Pleading*, 17, 18.

MURDER.

1. A slave having been convicted by a Court of Magistrates, &c., of Christ Church, of the murder of a slave, who received the mortal injury in that parish, but died in another, in the *same district;* execution of the sentence was arrested by prohibition. *The State* ex rel. *Mathews* v. *Toomer et al*..... 106

2. The A. A. 1793, (1 F. 339; 5 Stat. So. Ca. 231,) providing, in case of mortal injury inflicted in one county or district, and death ensuing in another, that the trial shall be had where the death occurred, extends to the case of homicide of one slave by another..... *Ib.*

3. In the case of offences cognizable by a parish magistracy, the principle of the Act is applicable to the separate parish jurisdictions,

though in the same district. *The State ex rel. Matthews* v. *Toomer et al* 106

4. The A. A. 1832, sec. 2, (p. 60,) concerning the trial of slaves, seems to be only of special application to the city of Charleston..... *Ib.*

NAVIGABLE RIVERS.

1. Law of *Navigable Rivers* considered. *Jackson* v. *Lewis et al*..... 259
2. *Quære*, whether the *Catawba*, in Chester district, is a navigable river..... *Ib.*
3. *Quære*, whether an unnavigable channel, severed by an island from the main stream of a navigable river, be subject to grant..... *Ib.*

NEGRO LAWS.

1. In an action for a penalty, under a City Ordinance against negroes being permitted to assemble or loiter in any shop longer than while actually engaged in lawful trading, proof that negroes remained for two hours in and about the defendant's premises, threw on him the burden of showing that they were not there unlawfully. *City Council* v. *Brandt*..... 72
2. One count, in an indictment charged the *buying of corn* from a slave, another the *selling of liquor*. The defendant, who was not a vendor of spirits by profession, had traded the liquor for the corn. A general verdict of guilty was held good; for the two counts charged the same act and the same offence. *The State* v. *Priester*... 103
3. It seems that it would have been otherwise, had the defendant been a distiller, vendor, or retailer by profession; for then, the offence in the *second* count would have been that created by A. A. 1834, while the *first* charged a violation of the A. A. 1817..... *Ib.*
4. The words "distiller, vendor, or retailer," in the A. A. 1834, refer only to distillers, &c., by profession or habitual practice..... *Ib.*
5. Any cruel beating of a slave is punishable under the negro Act of 1740, sec. 45, whether of the same grade of cruelty with the instances specified in the Act or not. *The State* v. *Wilson*..... 103

NEW TRIAL.

1. Where an obvious arithmetical error, in a discount specially pleaded, was corrected by the jury, so that the discount allowed was greater than that claimed by the plea, the Court would not set aside the verdict. *Richardson* v. *Murray*..... 11
2. An indictment for stealing twenty-five head of cattle, (against the A. A. 1789, P. L. 486; 5 Stat. So. Ca. 139,) having been sustained only by evidence of a less number, and the jury having found a general verdict of guilty, a new trial was ordered. *State* v. *Windham* 75
3. The expense, both of a full trial and of an appeal, having accrued from a nonsuit having been improperly refused below, the Court exercised the discretion of ordering, instead of a nonsuit, a new trial, with leave to the plaintiff to amend. *Wiggins* v. *Vaught*..... 91

ORDINARY.

1. The term of office of *Ordinaries*, is subject to be limited by Act of the Legislature, and is now limited, by A. A. 1833, to four years. *The State ex rel. Bronson* v. *Hunter*..... 288

PARENT. See *Action*, 3; *Consideration*, 1.

PARTNERSHIP.

1. To charge a firm with money borrowed by a partner, it is enough that the borrowing was on the *credit* of the firm, whether for *its use* or not. *Steele* v. *Jennings & Beatty*..... 183

PLEADING.

1. In an action for malicious prosecution, a declaration, alleging that the plaintiff was arrested, entered into recognizance, and was "afterwards therefrom discharged, and that the prosecution was wholly ended and determined," is not sustained by proof of acquittal before a petit jury. *Law et ux.* v. *Franks*..... 9
2. The word "*discharged*," is not equivalent in pleading to "*acquitted*," which term alone expresses a discharge upon trial *per pais*..... *Ib.*
2. The Court will not hear a motion to amend a declaration after the case has gone to the jury, and is arrested by a nonsuit..... *Ib.*
4. The declaration averred an assault on the plaintiff, "while sitting in his gig." The replication represented the defendant in the gig, "and the plaintiff gently laid hands on him to put him out," and then the assault:—held not to be a departure; for both allegations, though apparently discrepant, might be true, as they did not necessarily refer to the same exact point of time. *Macfarland* v. *Dean*..... 64
5. Plea to assault and battery, *son assault demesne;* which the replication confessed and avoided. The rejoinder substantially reiterated the plea, and was held bad for not traversing the replication..... *Ib.*
6. Approved precedents are to be followed, and a rejoinder wantonly deviating therefrom, held bad..... *Ib.*
7. The effect of a judgment in special demurrer is, only, that the party cast shall plead over or amend on payment of costs; so, his demurrer having been overruled, to a rejoinder concluding to the country, he should be allowed to add the similiter and go to trial..... *Ib.*
8. "I am not prepared to hold that a judgment for the defendant in demurrer as to one count in the declaration, would deprive the party of a right to judgment on a verdict found on the other counts."—(*O'Neall, J.*)..... *Ib.*
9. Writ served on two and declaration against only one of them is a variance fatal on special demurrer. *Fitch* v. *Debruhl*..... 185
10. On a cause of action, several, as well as joint, plaintiff may discontinue as to the rest, declaring against one, *by leave of Court*, but not otherwise..... *Ib.*
11. Sum. Pro. brought in the mercantile name of a firm, without setting out the partnership or the Christian names of the partners, would have been bad upon exception by plea; but not on motion for nonsuit. *Martin & Cornwell* v. *Kelly*..... 215
12. On the joint and several note of a man and his wife, a writ was issued against both, as separate persons. It seems that the declaration against husband alone, suggesting the relation of the parties, would

have been good; but, for want of such suggestion, it was bad on special demurrer. *Cozens & Brothers* v. *House*..... 233

13. *Quære*, whether on special demurrer, such variance would defeat the action, or, only put the plaintiff to amend..... *Ib.*

14. Such variance is not the subject of a motion for nonsuit after plea; for the plea has denied the declaration without reference to the writ. *Ib.*

15. "Unto and into a certain highway which runs near where the said plaintiff resides," is a sufficient description of the *terminus ad quem* in a declaration in case for obstruction of a private way; at any rate it is good after verdict. *Prather* v. *Owens*..... 236

16. *Quære*, whether so much of 11 Geo. 2, c. 19, is of force here, as provides that defendants, entitled to rent, may give special matter in evidence under the general issue. *Bagwell* v. *Jamison*..... 249

17. The general count for money had and received, in an action brought upon an interest-bearing demand, carried interest. *Marvin* v. *M'Rae*..... 61

18. "It was not necessary to count upon the interest, for it is an incident of money had and received, and does not depend upon an express promise."..... *Ib.*

19. A conditional promise having been declared on as a promissory note, exception was properly taken, by motion for nonsuit, after general issue pleaded. *Wiggins* v. *Vaught*..... 91

See *Discount; Action; Bill of Exchange*, 3. *Estoppel*, 1; *Landlord and Tenant*, 1, 2, 4; *Misnomer*, 1, 2; *New Trial*, 1, 2; *Negro Laws*, 2, 3; *Slander*, 1, 2, 3.

PRACTICE.

1. The order for judgment, indorsed by the clerk upon the record, is an "interlocutory judgment," as contemplated by the Act of 1746, "for preventing the discontinuance of process and abatement of suits;" and, after such order had, an action within the provisions of that law will not abate by the death of a party. *Dubose* v. *Ad'mr of Dubose*..... 29

2. The foreman of the jury in a slander case, who had used like words of the plaintiff to those on which the action was brought, was excused, against the defendant's consent, from sitting on the trial; and the defendant was not permitted, for that reason, to continue the cause. *Palmer* v. *Bogan*..... 52

3. The court will not hear a motion to amend a declaration, after the case has gone to the jury, and is arrested by nonsuit. *Law et ux.* v. *Franks*..... 9

4. An indictment for stealing twenty-five head of cattle, (against the A. A. 1789, P. L. 486,) having been sustained only by evidence of a less number, and the jury having found a general verdict of guilty, a new trial was ordered.

If the objection had been made in time, the judge on the circuit (Butler, J.) would have sent the jury back to amend their verdict. *The State* v. *Windham*..... 75

5. The expense, both of a full trial and of an appeal, having accrued from a nonsuit being improperly refused below, the court exercised the discretion of ordering, instead of a nonsuit, a new trial with leave to the plaintiff to amend. *Wiggins* v. *Vaught*..... 91

6. A plaintiff, who had gone into both Courts upon the same demand, being put to his election, chose to proceed in Equity. Motion by his attorney, that his case at law be continued, was refused; he had to take a *nonsuit* and pay costs. *Napier & Co.* v. *Gidiere, ex'or*..... 101

7. *Quære* as to costs, if he had proceeded in the proper form of a *retraxit*; for which purpose he must have appeared in person, not by attorney. But a *retraxit* is a renunciation of the whole cause of action, and it is doubtful whether the plaintiff could afterwards have proceeded even in Equity..... *Ib.*

8. In an action of trespass on the case, involving a right to water privileges, the defendant's motion for a survey was granted, though the plaintiff declined to join. *Scriven* v. *Heyward*..... 119

9. A motion for a rule of survey, which the Court would not have hesitated to grant, having been refused in courtesy to the judge who had rejected the same application at the previous term, an appeal upon the motion was allowed, *pendente lite*..... *Ib.*

10. Where there was a variance between a judgment and execution, and the sheriff's title under them; if the error were in the judicial records, then the Court might allow them to be amended; but otherwise, where the mistake was in the sheriff's deed, which is matter *in pais*. *Murphy* v. *Price*..... 14

11. When it is doubtful whether a nonsuit ought to be ordered, the Judge, on circuit, will sometimes, even against the inclination of his judgment, send the case to the jury. But the Appeal Court will not be restrained, by a verdict for the plaintiff, from opening the entire evidence to decide on the motion for nonsuit. *Hickman's exo'r* v. *King & Co*..... 132

See *Attachment; Jurisdiction; Justice of the Peace; New Trial; Pleading*, 10, 11; *Trover; Witness*, 1–7.

RAILROAD. See *Roads*, 2.

REMEDY, (at Law.) See *Action*, 1, 2, 3. *Acquiescence*, 1.

REPLY. See *Evidence*, 5, 9.

RETALING.

1. License to keep a tavern includes the privilege of retailing spirituous liquors. *The State* v. *Chamblyss*..... 220

RETRAXIT. See *Practice*, 7.

RIVERS. See *Navigable Rivers*.

ROADS, &c.

1. Where slaves, hired by the month, had been employed the greater part of the year by the same person, in working on the railroad, the hirer was properly held accountable by the commissioners for their road service in the parish in which they were so employed. *The State ex rel. Luten* v. *Commissioners of Roads*..... 95

2. Hands working on the railroad, (though by law a public highway,) are not exempt from ordinary road duty, *The State, ex rel. Luten*, v. *Commissioners of Roads*..... 95
3. The road duty of hired slaves is due at the place where they have resided and worked the greater part of the year..... *Ib.*
4. In what instances the hirer of slaves, or the owner, should be made liable for their road service, cannot be indicated by any precise rule, but must depend on circumstances to be judged of by the commissioners..... *Ib.*
5. Persons required by law to work on *Watt's Cut*, (Edisto Island,) are not exempt from ordinary road duty. *The State ex rel. Jenkins* v. *Commissioners Roads*..... 109
6. The Road Act of 1825, (A. A. p. 29,) repeals all previously existing exemptions..... *Ib.*
7. The commissioners of roads have power to impose and collect fines of twenty dollars, but no more..... *Ib.*
8. The Commissioners are authorized (A. A. 1825, sec. 12,) to assess, in certain cases, to a larger amount, but no mode of *collecting* is prescribed..... *Ib.*
9. *Post Masters* are not exempt from road duty. *The State ex rel. Campbell* v. *Commissioners of Roads*..... 210
10. *State* v. *Harrington*, (2 McC. R. 400,) and *State* v. *Martindale*, (1 Bailey R. 163,) considered..... *Ib.*

SET OFF. See *Discount.*

SHERIFF.

1. A fine of sixty dollars having been paid to the Sheriff, upon presentation (without levy) of an execution issuing from a Board of Commissioners of Roads, the Sheriff, who had the money still in his hands, was liable to an action of *indebitatus assumpsit* for the excess over twenty dollars, (the limit of the Commissioner's jurisdiction. *See Supra*, p. 109.)

   And, it seems, it would not have been otherwise, if the Sheriff had paid over the money. *Murray* v. *Moorer*..... 111
2. Payment to the sheriff, upon service, without actual levy, of an execution void for defect of jurisdiction, is not a voluntary payment. *Ib.*

SLANDER.

1. In an action of slander, words affecting the pecuniary credit of a merchant need not be averred nor proven to have been used in relation to his occupation as a merchant; for, in their nature, they strike at the root of mercantile character. *Davis* v. *Ruff*..... 17
2. Plaintiff in slander, who participates in the risks of a mercantile concern, but does not share in the profits, shall not recover for injury to his character as a merchant, without showing special damage..... *Ib.*
3. It is no slander of a *firm* to say that one of the partners is broke. The right of action on such words accrues to the individual..... *Ib.*
4. A verdict in slander, although much larger than the discretion of

the Court would have awarded, will not be disturbed on that account alone. *Davis* v. *Ruff*..... 17

See *Practice*, 2.

SLAVE.

1. The defendant's steamboat being about to run foul of that of the plaintiff, a slave of the latter was mortally injured in an attempt to prevent the collision. Some showing was made by the defendant, that the negro had wantonly exposed himself to the danger; but the jury were instructed that such a presumption ought not to be admitted in the case of a slave protecting his owner's property, without clear proof. *Ivy* v. *Wilson*..... 74

See *Murder*;——(Trading with,) *Misnomer*, 2;——(Cruelty to,) *Negro Laws*, 5;——(Hired,) Roads, &c., 1, 3, 4.

SOUNDNESS, WARRANTY OF.

1. The defendant, a free colored man, purchased an unsound slave who had been his wife, at a price greater than her sound value, although well aware of her unsoundness, and warned of it by the owner. It was a binding contract, and the verdict of a jury to the contrary was sent back. *Lyles* v. *Bass*..... 85
2. The purchaser of a negro had notice of his having a shortness of breath, which was attributed to a severe fall. It turned out, afterwards, that his lungs must have been dangerously diseased at the time of sale; though there was no appearance of unfairness or concealment. *Held*, that there was not sufficient notice to relieve the vendor for a sound price from his implied warranty. *Venning* v. *Gantt*..... 87
3. The sufficiency of notice of unsoundness, where it is equivocal, is a point for the jury to determine..... *Ib.*
4. An express warranty of soundness, in the bill of sale of a negro, precluded the implication of warranty of other representations on the same paper; as, that the negro was forty years old. *Stucky* v. *Clyburn*..... 186
5. A written warranty cannot be limited by parol evidence, (as, of purchaser's knowledge of a defect,) unless unintelligible without it. *Ib.*
6. A *hernia*, known to the buyer of a negro, was not one of those "defects that are plain and obvious to the senses of the purchaser, and required no skill to detect them," and which are not covered by an express warranty of soundness..... *Ib.*
7. As to such obvious defects as are excepted from the scope of an express warranty, "I should rather conclude that the defects mentioned are exempted from the warranty, not because they are obvious to the purchaser's senses, but because they are not cases of unsoundness."—*Evans, J.*..... *Ib.*
8. A warranty of soundness given after the completion of a sale, being *under seal*, could not be impeached for want of consideration. *Wilson* v. *Ferguson*..... 190

9. Some months after sale, the purchaser told the seller "he wished to give up the negroes on account of unsoundness," (the negroes not being present.) This was no sufficient tender to rescind the bargain and entitle the buyer to the whole purchase money as damages. *Wilson* v. *Ferguson*..... 190

10. A swelling in the abdomen of a negro woman, plainly visible, and known to the purchaser, it seems was no exception to the general scope of an express warranty of soundness; though no ill consequences were shown from the malformation, and the woman did full work..... *Ib.*

SUBSCRIBING WITNESS. See *Deed*, 2, 3.

SUM. PRO. See *Jurisdiction.*

SURETY.

1. A surety on a note, who has let judgment go by default, and has paid the debt, has recourse upon his principal for indemnification, notwithstanding that the latter, who was sued at the same court, by defending the case, obtained a decree in his favor. But, *semble*, not if he had been notified of the defence. *Stinson* v. *Brennan, adm'r*... 15

SURVEY. See *Practice*, 8, 9.

TAVERN. See *Retailing.*

TROVER.

1. A writ in trover cannot be served under the provisions of the Act of 1827, in any other district than that to which it is returnable. *Nesbit* v. *M'Daniel*..... 12

2. It is the intention of that Act, that the taking of the bond, &c., therein prescribed, shall be *after* action brought by service in the usual way..... *Ib.*

VARIANCE, (in Pleading.) See *Pleading*, 4, 9, 10, 12, 13, 14.

———Between execution and sheriff's deed under it———see *Practice*, 10.

VERDICT.

1. A point on which evidence has been given, on the trial, but on which, in consequence of what afterwards appears, the party is not permitted to rely, is not concluded by the verdict. *Jones* v. *Muldrow et al*..... 254

2. Where it did not fully appear, by the record, what was the precise issue submitted to the jury, other evidence was admitted for the purpose of ascertaining the scope of their verdict..... *Ib.*

See *Way*, 3; *Evidence*, 7, 10.

WARRANT. See *Distress*, 1.

WARRANTY. See *Soundness.*

WATT'S CUT. See *Roads, &c.*, 5.

WAY, RIGHT OF.

1. The mere use of a way over uninclosed land, will never ripen into

a presumption of right; but a prescription might have grown upon implied assertions of the right on the one part or admissions on the other. *Sims* v. *Davis et al*..... 1
2. The contrary opinion in *Roland* v. *Wolfe*, (1 Bailey R. 56,) and in *Garrett* v. *McKee*, (1 Bailey R. 341,) reviewed..... *Ib.*
3. In an action on the case for obstruction of a private way, a verdict of damages for the plaintiff, determines the right of way as against the defendant, and is conclusive evidence of it, in a subsequent action between the same parties. *Prather* v. *Owens*,..... 236

See *Pleading*, 15.

WILL.

1. A will legally executed shall not be set aside on the mere ground that its provisions are in favor of a mulatto woman, with whom the testator (a hard drinker and paralytic) had lived in disgraceful intimacy; who had had great domestic influence over him, and of whom he had sometimes appeared to be in personal fear. *Farr et al.* v. *Thompson ex'or*..... 37
2. There must be proof, not only of influence, but, that it had been expressly and unlawfully brought to bear upon the will..... *Ib.*
3. A disposition of property, though ever so capricious and unreasonable, will not be avoided on that ground alone..... *Ib.*
4. "What facts, if proved, shall constitute undue or improper influence, to avoid a will, I hold to be a question of law; and I think in cases of this kind, the particular sort of influence should be set down in the pleadings." (*Earle, J.*)..... *Ib.*

WITNESS.

1. A witness attending upon a subpœna ticket alone, without writ, is entitled to his fees from the party cast in the suit. *Johnson* v. *Wideman*..... 26
2. Where the successful party has paid witnesses subpœnaed on *both sides*, who has already been paid, without his knowledge, by his defeated adversary, he shall, nevertheless, have their fees taxed against the latter..... *Ib.*
3. And the party cast may recover at law, from the witnesses, not what he paid, but what they fraudulently received from the other party, to his damage..... *Ib.*
4. The rule, that one shall not discredit his own witness, is for the protection of the witness himself, and shall not be dispensed with by consent of the parties litigant. *Farr et al* v. *Thompson ex'or*..... 37
5. And the rule excludes, not only general evidence against the character, but former inconsistent declarations; and every matter that would be inadmissible or irrelevant, except for the purpose of impeaching the credit..... *Ib.*
6. But a party may introduce contradictory evidence upon facts material to the issue, and thus incidentally impeach the credit of his own witness; and this will not let in evidence of good character in reply..... *Ib.*

7. Where, however, a party was, irregularly, allowed to introduce the inconsistent declarations of his own witness, evidence of character ought to have been admitted in reply. *Farr, et al.* v. *Thompson, Executor* 37

8. In an action on a policy of insurance of freight lost *in transitu*, the patroon, who was also owner of the boat, was not a competent witness to show that the freight was lost by fire, so as to fix the liability of the insurers. *Frazier* v. *Insurance Company*..... 123

9. One of several plaintiffs, suing creditors, resisting an application for the benefit of the Prison Bounds Act, was not a competent witness for the other plaintiffs, to prove that the defendant's schedule was false. *Cavan* v. *Dunlap*..... 241

10. Defendant, in trespass for a fishery, under the plea of *liberum tenementum* showed a title in common with G.; but plaintiff proved an elder title. G's. testimony was then offered to prove defendant's right by prescription to fish—objected to for interest, as tenant in common, but held competent. *Jackson* v. *Lewis et al*..... 259

—— (Subscribing.) See *Deed*, 2, 3.

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